ANNOTATIONS

GRIFFIS

VOL. IX

AMERICAN

ELECTRICAL CASES

(CITED AM. ELECTL. CAS.)

BEING

A COLLECTION OF ALL THE IMPORTANT CASES (EXCEPTING PATENT CASES) DECIDED IN THE STATE AND FEDERAL COURTS OF THE UNITED STATES FROM 1873, ON SUBJECTS

RELATING TO

THE TELEGRAPH, THE TELEPHONE, ELECTRIC LIGHT AND POWER, ELECTRICAL RAILWAY, AND ALL OTHER PRACTICAL USES OF ELECTRICITY

WITH ANNOTATIONS

EDITED BY

AUSTIN B. GRIFFIN

Of the Albany, N. Y., Bar

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AMERICAN

ELECTRICAL CASES.

HERZOG v. MUNICIPAL ELECTRIC LIGHT COMPANY.

New York Appellate Division, First Department — Jan. 8, 1904.

89 App. Div. 569, 85 N. Y. Supp. 712.

1. WIRING BUILDING FOR ELECTRIC LIGHTS — CARE REQUIRED. — A corporation, employed to wire a building intended to be lighted by electricity, assumes no obligation to furnish the best material or to use the best method, and does not insure that the wires will continue for any definite or indefinite period to transmit safely the electric current. Its sole obligation is to use the care and skill ordinarily used by those engaged in like undertakings, and it is only for failure to perform this duty that it can be held liable.
2. DESTRUCTION OF BUILDING BY FIRE COMMUNICATED BY ELECTRIC WIRES — EVIDENCE. — In an action to recover damages for loss of building destroyed by fire, alleged to have been caused by electric wires placed in the building by defendant, evidence considered and held insufficient to warrant findings that the defendant was negligent in using single cap mouldings instead of double cap mouldings for affixing the electric wires to the ceiling.

Appeal by the plaintiff from a judgment of the Supreme Court in favor of the defendant. *Affirmed.*

Before VAN BRUNT, P. J., and HATCH, O'BRIEN, INGRAHAM, and MCLAUGHLIN, JJ.

WIRING BUILDINGS FOR ELECTRIC LIGHTS.

1. By Owners or Third Persons.
2. Care Required by Electric Light Company.
3. Fires Caused by Defective Wiring.
4. Injuries from Incandescent Lights.
5. Pleading.

1. By Owners or Third Persons. — Where parties undertake to wire their own buildings and then apply to a lighting company to deliver current,

Louis Marshall, for appellant.

Paul D. Cravath, for respondent.

Opinion by INGRAHAM, J.:

The plaintiff sues as receiver for the benefit of creditors of Joseph Ryan, and in the discussion of the question presented upon this appeal we will designate Joseph Ryan as the plaintiff. The action was brought to recover the damages caused by the destruction of a building on property of the plaintiff by fire on January 4, 1893. The complaint alleged that on the 19th day of July, 1892, the defendant agreed to wire the building 1059–1061 Broadway, Brooklyn, for Joseph Ryan, and in consideration of the payment to it of the sum of $600 agreed to wire the said premises in a good, proper, careful, and workmanlike manner, and to place upon said premises the wires and other necessary electric apparatus, so as to enable the said Ryan to supply the said premises with electric current for lighting the 275 16-candle power lamps which the said defendant agreed to place upon said premises, and said defendant further agreed that it would place upon said premises such wires and other apparatus as would enable the said Ryan to introduce upon his premises a supply of electricity for lighting the same with entire safety, and that such wires and apparatus would be properly insulated and inspected by said de-

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they must be assumed to take all risks resulting from the character of the wires and the method of construction. *National Fire Insurance Co. v. Denver Consolidated Electric Co.*, 7 Am. Electl. Cas. 715, 16 Colo. App. 86, 63 Pac. 949; *Harter v. Colfax Electric Light and Power Co., post*, 124 Iowa, 500, 100 N. W. 508. But in the case of *Reynolds v. Narragansett Electric Lighting Co., post*, 26 R. I. 457, 59 Atl. 393, it was held that it was not necessary in the ordinary wiring of a building for incandescent electric lights and in the arrangement of lamps therein for that purpose to anticipate and prepare for the access of dangerous or deadly currents upon the failure of apparatus wholly under the control of an electric lighting company.

Parties installing electric light fixtures in houses are not bound to anticipate that electric light companies furnishing electricity to the public will be negligent in either the construction or maintenance of their respective systems connecting therewith. *Gilbert v. Duluth General Electric Co., post*, 115 Minn. 171, 100 N. W. 653.

In the reported case it was held that a corporation employed to wire a building assumes no obligation to furnish the best material or to use the best method. Its sole obligation is to use the care and skill ordinarily used by those engaged in like undertakings.

fendant, so as to render the use thereof by said Ryan and the transmission of electricity by means thereof free from danger to the said Ryan and to his premises and the goods therein contained; that, "in violation of its aforesaid agreement, said defendant so carelessly, negligently, and unskilfully wired the said premises, and installed therein the said lamps; that by reason thereof, and without negligence on the part of said Joseph Ryan, the buildings and premises owned and occupied by the said Joseph Ryan, together with the stock of merchandise belonging to and owned by him, contained therein, were on or about the 4th day of January, 1893, set on fire and completely lost and destroyed."

The answer denies that the contract between Ryan and the defendant was correctly alleged; alleges that the only contract or agreement between Ryan and the defendant was contained in a written agreement consisting of two written instruments, copies of which are annexed to the answer. It admits that the defendant undertook to wire the premises, and to install therein the 275 16-candle power lamps, as provided in the said agreement annexed to the answer, and denies the other allegations of the complaint to which attention has been called. The two writings annexed to the answer are dated July 19, 1892. One is a request to the defendant corporation, signed by Ryan, to connect the main line with and supply the electric current for 275 16-candle power incandescent lamps upon the premises Nos. 1059–1061 Broadway,

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2. Care Required by Electric Light Company. — An electric light company owes a duty to patrons to exercise a proper degree of care to prevent a dangerous current of electricity from entering buildings. This duty extends to the family, servants, employees, and others who may rightfully be upon the premises. *Union Light, Heat & Power Co. v. Arneson, post*, 157 Fed. 540. An electric light company furnishing current for lighting buildings is bound to exercise a high degree of care to protect persons using such current. *Morhard v. Richmond Light & Railroad Co., post*, 111 App. Div. 353, 98 N. Y. Supp. 124.

A company transmitting a current of electricity of dangerous power, through wires, to a converter placed by it on the side of a dwelling house near to a balcony upon the tin roof of a portion of the first story thereof, having a gutter and leaders therefrom to the ground, owes a duty to any one lawfully using the balcony to take reasonable care to prevent the escape of the current in case of contact with the wires without fault on his part. *Brooks v. Consolidated Gas Company, post*, 70 N. J. L. 211, 37 Atl. 396. In the case of *Witmer v. Buffalo & Niagara Falls Electric Light & Power Co., post*, 112 App. Div. 698, 98 N. Y. Supp. 781, it was held proper *for the court to charge that* an electric light company *was required to use reasonable care in* constructing

Brooklyn, for which Ryan agreed to pay current electric rates. The other, dated the same day, is the order set out in the complaint.

The case has been three times tried. On the first trial the complaint was dismissed, the trial court holding that a clause in the contract which was annexed to the answer was a defense to the action. That dismissal was reversed by this court, the court holding that the question whether both contracts annexed to the complaint were one contract was a question for the jury. 9 App. Div. 573, 41 N. Y. Supp. 692. Upon the second trial that question was submitted to the jury, who found a verdict for the defendant. The judgment entered upon that verdict was reversed, and a new trial ordered, upon the ground that the evidence did not justify a finding that the conditions contained in this contract had been complied with so that the defendant was relieved from responsibility. 39 App. Div. 490, 57 N. Y. Supp. 225. Upon the third trial one issue was presented, and that was as to the negligence of the defendant. At the end of the case the defendant made a motion to dismiss the complaint, and to direct a verdict for the defendant. The court submitted to the jury four questions. The first question was, "Was the defendant guilty of negligence in August, 1892, in using single cap molding to put up the electric wires upon the ceiling of the upper story of the building leased by Joseph Ryan, and known as No. 1065 Broadway, in the city

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and maintaining its electric system to prevent a secondary wire which entered the plaintiff's house from being charged with a high voltage current.

Although an electric light company is not an insurrer of the safety of its customers, the same degree of care should be exercised to protect from injury the inmates of the house to which it is furnishing light as that which it is obliged to use to safeguard the traveling public from its overhanging wires in the highways. *Denver Consolidated Electric Co. v. Walters, post,* 39 Colo. 301, 89 Pac. 815.

An electric company in wiring a building and installing apparatus therein should exercise a degree of care commensurate with the risk involved. *Walker v. Leavenworth L. & H. Co.,* 9 Kan. App. 301; *Katafiasz v. Toledo Consol. Elec. Co.,* 24 Ohio Ct. 127.

An electric company before sending its current for lighting purposes through the apparatus installed in a building by other parties, is bound on its own responsibility to make a reasonable inspection to see whether the appliances are fit for use. *Hoboken Land & Improvement Co. v. United Electric Co., post,* 71 N. J. L. 430, 58 Atl. 1082.

3. Fires Caused by Defective Wiring. — An electric light company is not liable for a failure to insulate wires against electricity having its origin

of Brooklyn, as the business of electric wiring was then ordinarily practiced and understood by those conversant with the art?" That question was answered in the affirmative. The second question was, "If the defendant was guilty of negligence, was such negligence the proximate cause of the fire of January 4, 1893?" This question was answered in the affirmative. Third, "Were Ryan or any of his employees guilty of negligence which contributed in any degree, directly or indirectly, to cause such fire?" This question the jury answered in the negative. And, fourth, "What was the amount of damage suffered by Ryan by reason of the fire?" The jury answered $150,000, whereupon it was stipulated by the parties that "the jury be discharged, and that the May term of court be deemed continued and that the argument upon the pending motions be made on a day agreed upon, and that after such arguments the court might pass upon questions involved, and if necessary direct a general verdict to be entered in favor of the plaintiff as if the jury were actually in court, and with the same force and effect." These questions were subsequently argued, whereupon the court rendered its decision dismissing the complaint upon the whole case. The plaintiff's motion to direct a general verdict for the plaintiff was denied, and judgment was entered dismissing the complaint, and from that judgment the plaintiff appeals.

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in the clouds or atmosphere. Although an electric lighting corporation is bound to exercise the highest degree of care for the protection of life and property, its duty does not extend so far as to require insulation of its wires in a manner to protect against injurious consequences of a lightning stroke. Such consequences are by law ascribed to inevitable misfortune, or to "the act of God," and leaves the harm resulting from them to be borne by him upon whom it falls. *Phœnix Light & Fuel Co. v. Bennett*, 8 Am. Electl. Cas. 597, 74 Pac. 48.

In an action for damages caused by defective wiring, the facts that the fire originated where the wires entered the building, the defective character of the wires used, and the manner in which they were made, are sufficient to submit the question of the defendant's negligence to the jury. *Romano v. Vicksburg Ry. & Light Co., post*, 39 So. 781.

Where a fire results in consequence of the negligence of an electric light, heat, and power company in installing electric wires in a building, and in thereafter maintaining them, an insurance company, which has been obliged under its policies to pay loss resulting from such fire, becomes subrogated to the rights of its policy holders, and may maintain an action to recover the loss paid by it from the electric light company. *German-American Ins. Co. v. N. Y. Gas & E. H. & P. Co., post*, 103 App. Div. 310, 93 N. Y. Supp. 46.

The court below dismissed the complaint upon the ground that the evidence was not sufficient to sustain the special finding of the jury that the defendant was guilty of negligence in August, 1892, in using single cap molding to put up the electric wires upon the ceiling of the upper story of the building as the business of electric wiring was then ordinarily practiced and understood by those conversant with the art, and upon this appeal we have to determine the correctness of this conclusion. The undisputed facts are that the roof upon the plaintiff's building was completed in June, 1892; that the contract for the electric wiring was made on July 19, 1892; that the defendant's work under this contract was completed in August, 1892, when the electric wiring and equipment were inspected by inspectors of the New York Board of Fire Underwriters, and approved by them on August 19, 1892; that the electric current was used for lighting the building about September 10, 1892; that in the middle of November, 1892, there was a leak in the roof of the plaintiff's building, which was repaired; that some time in December, 1892, another leak was discovered; that on January 1, 1893, there was a severe storm, during which the roof of the plaintiff's building again leaked, and on January 4, 1893, a fire broke out on the top floor of the building, which started in the neighborhood of the wires installed by the defendant, and which resulted in the destruction of the build-

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4. Injuries from Incandescent Lights. — (See note to *Peters v. Lynchburg, etc., Light Co., post.*)

5. Pleading. — A complaint, stating in substance, that the defendant is in

ing. There was evidence to sustain a finding that this fire was caused by these electric wires installed by the defendant, and the jury have so found. The question in dispute is whether there was evidence to sustain the finding that the defendant was negligent in installing these electric wires. It must not be lost sight of that we are determining a question which depends upon negligence in July and August, 1892. It would be manifestly improper to charge the defendant with a knowledge which has been gained by experience subsequent to the time when this work was done. The question that was submitted to the jury, to which no objection was made by the parties, was whether the defendant was guilty of negligence in August, 1892, in using single cap molding to put up the electric wires, as the business of electric wiring was then ordinarily practiced and understood by those conversant with the art. We must also bear in mind that it was the plaintiff who had constructed the roof of the building in which these wires were placed; that the roof was new, and apparently water tight, and up to the time when the contract was made and these wires installed it had shown no signs of leaking; that this roof was under the control of the plaintiff, and upon him was the obligation to keep it in such a condition as would protect the interior of the building and the wires placed in it by the defendant; and that the defendant was justified in assuming that this duty would be performed, and that the roof would prove to be capable of keeping out the water. The current was turned on the building, and this electric equipment was used from September 10, 1892, until the date of the fire, on January 4, 1893. What it was that caused this electric appliance to give out on the night of January 4th is involved in considerable doubt. The rain which caused the leak was on January 1st. The building was used on each of the succeeding days, and the electric lights were in constant use during that period. From January 2d to January 4th it was extremely cold, the temperature being all the time below the freezing point, so that there could be no additional leak after the 1st of January. During this period the building was heated, and it would seem that any moisture that came on the inside of the building on January 1st would have dried up long before the time of the fire, on January 4th. The fact that this wiring was in use on January 2d, immediately after the rain, when the walls were wet in con-

sequence of this leak, without the slightest indication that the insulation was defective, renders it improbable that the leak on January 1st affected the insulation of the wires so that it set fire to the building on January 4th, and this is material when we come to consider the method adopted from which the plaintiff's witnesses seek to adduce evidence of negligence on the part of the defendant.

In connection with the method adopted by the defendant, the plaintiff testified that he told the defendant's agent that he wanted this wiring done as cheap as he could get it. Hogan, the agent, testified (and this was not disputed by the plaintiff) that his first estimate for doing the work was $650; that the palintiff objected to that price, and offered $600, which was finally accepted. The plaintiff also testified that in the middle of November there was quite an extensive leak which appeared on the ceiling in the building in which the fire was discovered, at the rear of the skylight, and running along towards the front of the building; that there was a discoloration on the ceiling all the way from the rear end of the skylight down through the passageway; that the molding which covered these electric wires was right over this discoloration; that the discoloration was around and on both sides of this molding and under it; that it was quite a large leak, and the plaintiff had to take up pails and buckets and set them around the floor and spread sawdust on the floor to keep the water from going down to the next floor; that altogether a half barrel of water came down through the leak; yet during all the time that the walls were wet from this leak these electric lights were used, with no indication that there was anything defective in the insulation, or that dampness of the walls had affected the lighting equipment. The second leak in December also appeared to have affected the same part of the roof.

We now come to the evidence offered by the plaintiff to sustain his allegation that the defendant in adopting the method that it did was guilty of negligence; and in determining this question, of course, we must assume that the evidence offered by the plaintiff was accepted by the jury. The method adopted by the defendant was described by the plaintiff's witnesses as "single electrical wiring." The wire used by the defendant was a copper wire, tinned, covered with a coating of rubber, and on top of the rubber

a linen tape saturated with rubber. These wires were placed along the ceiling, and covered by a single cap molding, which was of wood, with receptacles in which the wire was placed, and the molding was then nailed to the ceiling of the room; that the wire in general use at that time was subject to abrasion where the insulation cracked; that if there was a break in the insulating material, and there is moisture or metallic contact between the wire and some outside object or substance, there was danger of a leak of the electricity. There was in use for interior wiring at the time what was called double and single cap molding. The double cap molding consists of a strip of wood with a groove in which the wires are laid, and covered by a cap that was nailed on to keep the wires in place. In the single cap molding the groove is in the molding, and this molding is nailed to the ceiling; the difference being that in the double cap molding there was wood between the wire and the ceiling and in the other there was not. The experts called by the plaintiff testified that in their opinion it was not a safe, proper, and workmanlike method of construction on the top floor of a building immediately under the roof to use a single cap molding, because that form of construction was liable to retain any moisture that would leak through the roof, and that holding moisture in a single cap molding containing wires attached to these appliances would render it liable to cause fire, because of the escape of electricity.

Upon cross-examination of the plaintiff's witnesses it appeared that incandescent lighting was first used in New York in 1880 or 1881; that the art of electric lighting from that time on has been a progressive art, and from time to time improvements and changes have been introduced; that during this period in which electric lights have been progressing there have been different opinions held by electricians as to the methods in which wiring should be put up and currents applied and the lighting done, and there has been a good deal of dispute and controversy on these subjects; that single cap molding was in use in New York and in Brooklyn in 1892, and very frequently used; that up to and including July, 1892, the witness knew of but one fire, which was at 848 Broadway, New York, caused by an alternating current, where the wires were supported by a molding against a wooden ceiling; that he was not certain whether that fire was before or

after July, 1892; that this single cap molding was used on the ceiling of the Fifth Avenue Hotel where electricity was installed in the year 1892, that work being done under the supervision of one of the witnesses for plaintiff; that the roof of the Fifth Avenue Hotel was, at the time when that wiring was put on, a tar gravel roof laid upon felt, like the roof of the plaintiff's building; that these moldings in the Fifth Avenue Hotel have remained there ever since, not having been touched; that this work at the Fifth Avenue Hotel was done under the direction of Mr. William H. Brown, the general manager of the company, in whose employ the witness then was, a man of large experience at the time, and a very able man. A witness who was an electrical engineer and contractor, and the general superintendent of the Complete Construction Company of New York, from the latter part of 1888 until the latter part of 1893, testified that he was familiar in July, 1892, and before that time, with the work of electrical wiring for buildings for the use of electricity in Brooklyn and New York, and the method which was in general use by electricians; that he was familiar with the single cap molding of the character which was shown to have been used in the plaintiff's building; that in July, 1892, it was not good, proper, safe, and workmanlike construction to use a single cap molding for the purpose of holding in place the wires which were laid against the wall immediately under the roof of a building in this vicinity; that if there was any liability of moisture these wires should be placed in porcelain, and if there was no liability of moisture they should be placed in double cap molding. On cross-examination the witness testified that in 1892 he was also engaged in wiring the Fifth Avenue Hotel, and that he used single cap molding on the job; that all the work then done remained in the same condition to the time of the trial; that single cap molding had been discarded at that time generally. Another witness, an electrician, who had been employed by the Edison Electric Illuminating Company from 1889 to 1892, was called by the plaintiff, and testified that he was acquainted with the different methods in general vogue among competent electricians for wiring buildings for electricity in July, 1892, and this vicinity; that it was not the practice in July, 1892, to use single cap molding for the purpose of holding in place wires which were laid against the ceiling immediately under the roof

of a building, and that it was not a safe construction; that it was not safe, because there was a risk of fire being caused through some action of the current in contact with abrasions of the wire and moisture. Another electrical engineer was called by the plaintiff, who testified that he was acquainted with the method of electrical wiring which was in vogue generally among electricians in July, 1892; that in view of the art of electrical wiring as it existed in July, 1892, this method for the purpose of holding wires in position on a ceiling immediately under a roof was not good, proper, safe, and workmanlike construction, for the reason that a molding placed in that position for the grooves upward would tend to retain moisture that might come through the roof, and therefore tend to produce leaks between the wires. Upon cross-examination he testified that there had been during the progress of the art of electric wiring a considerable variety of opinions among electricians as to the various appliances used in electrical equipment; that the matter had been the subject of continual experiment and improvement; that, as to the method of putting up wire, there has been considerable discussion and diversity of opinion, but that the methods that were in vogue in 1890 were still in vogue and considered good; that the single cap molding was in vogue in 1890, and that the double cap molding came in very soon after that; that the witness lived in Connecticut from 1887 to 1893, and did not have during those years any extensive experience in regard to the methods of putting up electric wiring equipments in New York or Brooklyn.

I have thus detailed the evidence offered by the plaintiff upon which this verdict of the jury was based, and, with the single exception of the statement of one witness that single cap molding had gone out of use in 1892, there is no evidence to show that this method adopted by the defendant was not one in general use at the time this contract was made, or was then considered an improper method. We have the opinion of several witnesses that it was not a proper method, and dangerous, if the grooves in the molding became filled with water; but this is based entirely upon the opinions of these witnesses, in face of the fact that this method was at the time mentioned in use for purposes of this character.

On behalf of the defendant it was proved that the wire used for wiring this building was what is known as "Bishop's White Core

Rubber Covered Wire," described by the plaintiff's witnesses as being the best wire in use. The superintendent of the defendant, who had been such superintendent up to the year 1899, when he was employed in the same capacity by the Edison Company, testified that, in accordance with the practice in vogue in the summer of 1892, there was no distinction drawn with reference to the use of the single cap molding or double cap molding between the ceiling of top stories and the ceiling of other stories in buildings; that during all his experience he never knew of a fire originating underneath a molding where the alternating current was used; that double cap molding at that time was occasionally used, but had not come into general use. The inspector of the board of fire underwriters testified that he had been inspecting electric wiring for the board of fire underwriters for upwards of ten years; that in the summer of 1892 he had made frequent inspections of electric wiring installation in New York and Brooklyn for the board of fire underwriters; that he inspected the wiring electrical appliance on the premises of the plaintiff; that he inspected the method by which the wires were put on the walls and ceilings; that he saw the kind of molding that was put up, and saw the place where it was put up; that he was acquainted with this single cap molding, and that it was universally used in the ceiling in dry places; that at that time it was used also in top ceilings as well as other parts of buildings; that they did not discriminate between the tops and other parts of buildings; that this molding was such as was used for electrical wiring in the summer of 1892. Several witnesses who were experts were called for the defendant, and testified that in the summer of 1892 single cap molding was generally in use in Brooklyn and in New York; that double cap molding, or molding sometimes called "box molding," had not come into extensive use in the summer of 1892, for branch circuits; that wiring men generally used single cap molding; that single cap moldings on ceilings on top stories was generally proper practice at that time, and many buildings were detailed by the witnesses for the defendant which were wired for electric lighting about this time, and in which this method adopted in the plaintiff's building was employed. There was also evidence of the defendant that double cap molding subsequently superseded the single cap molding because of the fact that the board of fire underwriters

prohibited single cap molding, but this was some time after 1892. The evidence as to the buildings that had been wired by the same methods adopted by the defendant about the year 1892, or just prior thereto, in New York, was uncontradicted by the plaintiff, and the great mass of expert testimony, I think, conclusively established that fact. In fact, it may be said that the evidence is almost uncontradicted that at this time the single cap molding was in extensive use for the installation of this character of electric lighting; that no fire had ever been caused by the use of such molding; and, while certain electrical experts considered it dangerous, it was the method usually adopted for wiring buildings.

We have, as the evidence upon which the plaintiff seeks to establish negligence, the testimony of four persons, who were connected with the installation of electrical wiring in New York in 1892, that in their opinion this method adopted by the defendant was dangerous and unsuitable. We have, on the other hand, testimony specifying buildings and instances in which this method was adopted. We have the uncontradicted evidence that with one exception, the date of which is not fixed, no fire had ever occurred in consequence of the adoption of such a method as that used by the defendant, and the fact, which may be said to be undisputed by any substantial evidence, that this was the method generally in use. It is evident that any verdict of the jury that the adoption of this method was negligent would be clearly against the weight of evidence, and should not be allowed to stand.

The question, further, is whether it can be said that there was no evidence to show negligence, so that the court was justified in dismissing the complaint. It is proper to call attention to the fact that there is no evidence to show that improper materials were used. The evidence is substantially undisputed that the wiring and molding used were of the proper character and of the kind generally in use, the sole criticism upon the defendant's method being that this single cap molding was used. In fact that a piece of wire produced, which was taken from the wiring used in a stable by this defendant company, is no evidence that such wire was used in the building in question. The statement of the plaintiff, who had no experience with electric wiring, that the piece of wire produced was of the same character as the wire used in this building, is completely overcome by the testimony as

to the character of the wire used, and it is conceded by all of the witnesses that the wire specified by the defendant's witnesses as used in the building was of the best character and proper for the purpose.

The rule of law applicable to a question of this kind is not in substantial dispute. The defendant was employed to wire the plaintiff's house for the purpose of electric lighting. It accepted such employment, and undertook to do the work. It assumed no obligation to furnish the best materials or the best method. It did not insure that the wires when used would continue for any definite or indefinite period to safely transmit the electric current to all the building. What it undertook to do was to use the care and skill ordinarily used by those engaged in furnishing these appliances, and it is only for a neglect to perform this duty that it can be held liable. The workmen that were employed, so far as appears, were competent men to do the work. The materials that were employed were proper materials for the purpose. The method employed, including this molding, was that in general use at the time, employed in a large number of buildings, which are specified in the evidence. It is true that several experts considered that the method was not safe; but a much larger number of experts considered that it was a safe and proper method at the time it was applied, and was so considered by those engaged in the business of wiring for the use of electricity. The work was finished in August, and the electricity was turned on about the 10th of September, and its use continued for nearly four months without disclosing any defect, although both in November and December there had been a leak in the roof which had discolored the wall along which this wire was carried. There was no evidence that at the time this work was done the roof had ever leaked, or that there was any reason to anticipate that the roof would leak and make the ceiling of the building damp, so that the method adopted would be dangerous or improper; and there is no evidence that an electric wire used to carry on alternating current had ever set fire to a building when installed in the manner adopted by the defendant. The defendant might have adopted a method which subsequent experience had shown would be safer than that adopted, but the defendant was not chargeable with the knowledge that had been acquired by experience with electricity

after the work was done. The utmost that could be said from the evidence was that the method that should be adopted in doing such work was a matter about which experts differed, and that the defendant adopted a method which was approved by a majority of those having expert knowledge upon the subject. The obligation assumed by the defendant was not different from that assumed by a physician or surgeon called in to attend a patient who needed professional advice.

In *Pike v. Honsinger,* 155 N. Y. 201, 49 N. E. 760, 63 Am. St. Rep. 655, the Court of Appeals say:

"The rule of reasonable care and diligence does not require the exercise of the highest possible degree of care, and, to render a physician and surgeon liable, it is not enough that there has been a less degree of care than some other medical man might have shown, or less than even he himself might have bestowed, but there must be a want of ordinary and reasonable care, leading to a bad result. * * * The rule requiring him to use his best judgment does not hold him liable for a mere error of judgment, provided he does what he thinks is best after careful examination."

This same general principle has been applied in cases where the plaintiff's property was destroyed by fire in consequence of an explosion, or a fire happened upon adjoining premises in possession of the defendant. In *Cosulich v. S. O. Co.,* 122 N. Y. 118, 25 N. E. 259, 19 Am. St. Rep. 475, the obligation of a person in the use of his property, as affecting the property adjoining, is stated as follows:

"The defendant was not maintaining a nuisance. Its business was lawful, and in its conduct the law does not impose the obligation of saving harmless others from the consequences resulting from the occurrence of inevitable accident, but rather burdens it simply with the duty of using reasonable care and caution to save others from injury. If it omitted that duty, and failed to observe that ordinary care which was incumbent upon it, then, because of such neglect, it became legally chargeable with the damages directly resulting therefrom, but not otherwise. As the existence of negligence is an affirmative fact, to be established by him who alleges it as a foundation of his right of recovery, it was incumbent upon the plaintiffs to point out by evidence the defendant's fault, for the presumption is, until the contrary appears, that every man has performed his duty."

The same rule is applicable where an employee has been injured by machinery or appliances furnished by his employer. In *Harley v. B. C. M. Co.,* 142 N. Y. 31, 36 N. E. 813, this obligation upon the master is stated as follows:

"The master does not guarantee the safety of his servants. He is not bound to furnish them an absolutely safe place to work in, but is bound simply to

use reasonable care and prudence in providing such a place. He is not bound to furnish the best known appliances, but only such as are reasonably fit and safe. He satisfies the requirements of the law if the selection of machinery and appliances he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the master liable, not a mere error of judgment."

In *Reiss v. N. Y. S. Co.*, 128 N. Y. 103, 28 N. E. 24, the same rule was applied in a case much like the present, where the defendant was employed to supply steam by means of a connection in its basement with the mains or pipes under the street, and a system of pipes, valves, and meters set up by it in the basement of the plaintiffs' building. The defendant's mechanics put in and adjusted the apparatus in the latter part of June, 1887, and had finished it on Saturday, July 2d. A few days after, when the appliances were first used, a valve was blown off, and steam escaped into the basement, doing damage to the plaintiffs' goods, for which they sought to recover. The plaintiffs claimed that this valve blew out because the screw by which it was fastened into the valve was too small, and that, therefore, the threads of the screw did not hold; and in holding the defendant not liable the court says:

"If this was the defect, there is no proof that any ordinary care ought to have discovered it. The bonnet and the valve were made by competent manufacturers, and had been properly tested by them, and the defendant had no reason to expect such an imperfection. When the steam was let on, the 2d day of July, the bonnet and valve proved adequate, and there was no indication from the examination then made of any imperfection or weakness therein, and they were able to stand the pressure to which they were subjected until the time of the explosion, on the 5th day of July. One or two witnesses gave opinions that if the screw had been large enough it would not probably have blown out; but there is considerable other evidence from witnesses shown to be competent to speak upon the subjejct that, by the formation of what is called a water ram, the bonnet would have been pressed out, even if the screw had been large enough to fit closely and compactly into the valve, and that the pressure would cause an expansion of the nut or valve into which the screw passed, so that it could be blown out without injuring the thread. The accident was a very unusual one, which had never before happened in the business of the defendant, and it was not bound to anticipate or guard against."

And it was held that there was no evidence of negligence which justified the court in submitting the question of the defendant's liability to the jury.

In *German Am. Ins. Co. v. Standard Gaslight Co.*, 67 App. Div.

339, 73 N. Y. Supp. 973, we sustained a judgment for the plaintiff where a workman employed by the defendant had been engaged in performing the work that the defendant was employed to do, and thereby caused injury to the plaintiff's property; but this was based solely upon the negligent act of the defendant in applying a match to locate a leak in the gas pipe in immediate proximity to inflammable material — a very different question from that presented where the negligence charged is in selecting a method of installation of electric wiring, where the most that can be said is that there was a difference of opinion among electricians and experts as to the best method of doing the work, and where the defendant adopted one of the methods then in general use, and which was approved by experts skilled in the art.

Applying the rule that obtains in all cases where a defendant is sought to be charged with negligence, we think that the evidence was not sufficient to justify a finding of negligence; that the most that can be said is that the defendant adopted a method which some experts engaged in the business considered to be unsafe, but other experts who were equally competent to judge considered safe, and which was in general use at that time; and that, if a mistake was made, it was an error of judgment, and not negligence. Taking this view of the case, we think the court below was clearly right in dismissing the complaint, and the judgment appealed from should be affirmed, with costs.

All concur, except HATCH, J., who dissents.

COLUMBUS R. CO. v. DORSEY.

Georgia Supreme Court — Jan. 13, 1904.

119 Ga. 363, 46 S. E. 635.

1. INJURY TO TELEPHONE LINEMAN FROM ELECTRIC LIGHT WIRE — DEFECTIVE INSULATION — CONTRIBUTORY NEGLIGENCE. — Where a lineman of a telephone company, of experience, aged nineteen years, was killed by contact with a wire of an electric lighting company, which had been strung on the poles of the telephone company, and from which wire the insulation had

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Injury to Telephone Linemen from Contact with Other Electric Wires.—As to injury to telephone lineman from contact with electric light wire while climbing a telephone pole, see *Gloucester Electric Co. v. Dover, post; Dover v. Gloucester Electric Co., post; San Antonio Gas & Electric Co. v. Balders, post; Drown v. New England Telephone & Telegraph Co., post; Barto v. Iowa*

worn off near the pole which he had climbed, and for several feet on each side of the pole — he knowing, or being able to know by ordinary diligence, that the wire was so exposed — his mother cannot recover from the electric lighting company the value of his life.

(Syllabus by the Court.)

Error from City Court of Columbus. Judgment for plaintiff, and defendant brings error. *Reversed.*

L. F. & Frank Garrard, J. H. Martin, and *Cecil Neill,* for plaintiff in error.

W. R. Hammond and *John D. Little,* for defendant in error.

Opinion by TURNER, J.:

Mrs. Dorsey brought a suit against the Columbus Railroad Company, a corporation having its principal office in the city of Columbus, alleging that the defendant had injured and damaged her in a large sum. Her petition, as amended at the trial, set forth averments to the following effect: The defendant was the owner of an electric lighting system in the city of Columbus, and was operating an electric lighting plant. In the operation of its business on a day named, the defendant was engaged in manufacturing and generating currents of electricity, and transmitting them along wires strung upon poles in that city, which currents were of sufficient strength to be dangerous to human life. On said day a son of the plaintiff was in the employ of the Southern Bell Telephone & Telegraph Company, and was performing the duties of a lineman for said last-named company. As such lineman, he ascende

and dangerous charge of electricity through his body, by means of which he was instantly killed. Plaintiff's son was acting with proper prudence and precaution, and was without fault on his part in coming in contact with said wire. This wire which was charged with the current of electricity which caused his death was the property of the said defendant, and was in use by said defendant at the time in the transmission of one of its currents of electricity in the transaction of its business; and the same was, or should have been, an insulated wire, but the insulation of the wire had become worn off at a point near the pole, and for several feet on either side of the same, so as to leave said wire exposed, and making it dangerous at that point. The defendant was negligent in allowing the insulation of said wire to be worn off, and said wire to remain exposed, so that a person climbing said pole would be in danger of coming in contact with an exposed wire heavily charged with a dangerous current of electricity. Said wire of the defendant was strung upon the pole of said telephone company with the consent of said telephone company, and it was the duty of the defendant to protect said wire so that the operatives of the telephone company, whose duties it was to ascend the poles of said company in and about their duties in connection with their work for it, would not be exposed to the danger of coming in contact with a wire heavily and dangerously charged with electricity, and the defendant was negligent in not so doing. The plaintiff further alleged in her petition that she had been dependent upon her son for a support, and that he had, at and before the time of his death, contributed to her support; that he left neither wife nor children, never having been married; and that at and before his death he was able to earn, and did earn, the sum of two dollars per day.

To this petition the defendant demurred generally, on the ground that no cause of action was therein set forth, and also demurred specially because (1) the plaintiff did not allege that the defendant company strung its wire upon the pole of the telephone company, or that it was strung on its pole, with the knowledge and consent of the defendant company; and (2) because the plaintiff did not aver that her son did not know of the fact that said wire was attached to the pole of the telephone company, and had become defective by reason of the insulation being worn off.

The court below overruled these several demurrers, and the defendant excepted. In the argument upon these demurrers before this court, it was conceded by counsel for the defendant in error that it was to be presumed that this unfortunate lineman did know that the wire of the plaintiff in error was strung upon the pole of the telephone company, and that he also knew that at or near this pole, and for several feet on each side of it, the wire was naked or without necessary insulation. It seems, also, that he was a young man of experience in his business, earning two dollars a day. Under these circumstances, if there was a safe way to pass this dangerous wire, it was incumbent on the lineman to avoid the danger, and his failure to do so would demonstrate negligence on his part. On the other hand, if it was unsafe to undertake to pass this dangerous wire, the lineman should not have attempted it. In either view, he did not observe ordinary care, and his mother is not entitled to recover. Civ. Code 1895, § 3830. The general allegation in her petition that he was acting with proper prudence and precaution, and was without fault on his part, seems to be rebutted by the facts and circumstances recited in the petition. We therefore think the demurrers should have been sustained.

Judgment reversed. All the justices concurring.

GRAVES v. CITY AND SUBURBAN TELEGRAPH ASSOCIATION.

United States Circuit Court, S. D. Ohio — Jan. 23, 1904.

132 Fed. 387.

1. JOINT LIABILITY OF TRACTION COMPANY AND TELEPHONE COMPANY FOR INJURIES TO EMPLOYEE. — Where the omissions of duty complained of against a traction company are its failure to insulate a feed wire, its failure to provide a guy wire with a circuit breaker, its failure to prevent contact of the guy wire with the pole of a telephone company, its failure to prevent the displacement of the feed wire, and its lodgment on the iron spike of the telephone company's pole, and its failure to remove it therefrom; and the omissions of duty upon the part of the telephone company are its failure to remove the feed wire from the iron spike, and its failure

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Joint and Several Liability of Telephone Company and Electric Light Company. — See *Drown v. New England Telephone & Telegraph Co., post*, and note thereunder.

to prevent the contact of the guy wire with the wooden pole, the omis sions of each are concurrent and both companies are jointly liable for injuries resulting therefrom.

2. SAME — SUFFICIENCY OF PETITION. — A petition alleging that: "Said wires were not properly insulated, and, through the negligence of said Cincinnati Traction Co. and the City & Suburban Telegraph Association, one of said wires had been suffered to be and remain for a long time in contact with one of the iron steps aforesaid, and the insulation at the point of such contact to be and remain worn, defective, and imperfect, so that the metal of said wire was in contact with the metal of said iron step or spike," is sufficient on demurrer although it does not show that the telephone company had notice of the danger.

On demurrer to petition.

Harmon, Colston, Goldsmith & Hoadley, for plaintiff.

Peck, Shaffer & Peck and *Outcalt & Foraker,* for defendants.

Opinion by THOMPSON, District Judge:

The case is submitted upon demurrer to the petition, the grounds of demurrer being, first, that the petition does not state facts sufficient to constitute a cause of action; second, that there is a misjoinder of parties defendant; third, that separate causes of action against the several defendants are improperly joined.

The petition shows that a pole of the telephone company erected on Harrison avenue for the purpose of carrying its wires had iron spikes driven into it at intervals along its sides, to serve as steps to enable persons having occasion to do so to ascend the pole; that the traction company had lines of trolley and feed wires carried on iron poles or posts on the same street, near to the telephone company's line of poles and wires; that one of the feed wires of the traction company, through the negligence of the two companies, was suffered to be and remain for a long time in contact with one of the iron spikes aforesaid, where, by reason of insufficient insulation, the metal of the feed wire came in contact with the metal of the spike; that a guy wire of the traction company extended from one of its iron poles past and touching the wooden pole of the telephone company to and supporting certain braces and stays connected with and supporting the trolley wires of the traction company; that through the negligence of the traction company the guy wire was not provided with a circuit breaker, between the iron pole and the wooden pole, to prevent currents

from passing along the same through the iron pole to the ground; that the National Automatic Fire Alarm Company obtained from the telephone company the right to use said wooden pole to carry its wires; and that the plaintiff's intestate, Thomas J. Graves, an employee of the National Automatic Fire Alarm Company, in the discharge of his duties as such employee, and for the purpose of stretching the wire of the National Automatic Fire Alarm Company upon said wooden pole, ascended the same, and in so doing placed his foot upon the iron spike aforesaid, which was in contact with the feed wire of the traction company, and at the same time necessarily came in contact with the guy wire, receiving a heavy current of electricity through his body, which caused him to fall to the ground and receive injuries which resulted in his death.

Upon this state of fact, the plaintiff claims that the death of Graves was caused by the concurring negligence of the two companies — the telephone company and the traction company — and that they are jointly and severally liable for the loss sustained. The two companies, however, insist that they are improperly joined as defendants, because the torts complained of are not joint, although they may be concurrent and related, and in support of that proposition cite *Morris v. Woodburn,* 57 Ohio St. 330, 48 N. E. 1097, and point out that the negligence of the traction company "lies in not preventing an escape of a dangerous current of electrical fluid which it was conveying through a street by its feed wire," and that "its duties and liabilities are greater than those of the telephone company to see that its pole is not made dangerous by the presence of a trespasser."

The question presented in *Morris v. Woodburn, supra,* was whether the mere omission of the city of East Liverpool to perform its statutory duty in keeping the sidewalk in question in repair rendered the city alone liable for the injury sustained by the plaintiff, or whether the defendant was primarily liable therefor because she had created a nuisance dangerous to those using the walk; and the court said (page 335, 57 Ohio St., page 1097, 48 N. E.):

"These are concurrent and related torts, but they are not joint. In view of their independent character, the plaintiff might, at her election, maintain her action against either the city, for its omission of duty, or against Mrs. Morris, for the creation of the nuisance which occasioned her injury. And it

appears from reason and authority that the primary liability in such case is upon him who actively creates the nuisance, so that, if a recovery were had against the city, it might in turn recover from the perpetrator of the wrong. *Chicago v. Robbins*, 2 Black 418, 17 L. Ed. 298; *Robbins v. Chicago*, 4 Wall. 657, 18 L. Ed. 427; *Rochester v. Campbell*, 123 N. Y. 405, 25 N. E. 937, 10 L. R. A. 393, 20 Am. St. Rep. 760. The liability of the owner of the abutting property for an injury resulting from torts of this character, notwithstanding the omission of duty by the municipality, is necessarily implied in *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590, and *Railroad v. Morey*, 47 Ohio St. 207, 24 N. E. 269, although the precise question may not have been raised."

The question presented by this demurrer was not before the court in *Morris v. Woodburn, supra.*

In Clark & Linsell, Torts, 54, it is said:

"Where, however, the tortious acts of several persons contribute to produce but one joint damage, such persons will, it is suggested, be joint tortfeasors however independent their acts may be. Thus, if a person wrongfully leave unfenced a pit which he has dug by the side of a high road, and another wrongfully does some act in the road whereby horses passing along it take fright and swerve into the pit, or if some person negligently allows an escape of gas which another person negligently causes to explode by taking a lighted candle into the room, in each of such cases the two independent persons will presumably be joint tortfeasors, for each will be liable for the whole damage done. There is, indeed, apparently no direct authority on the point. But in *Palmer v. Wick & Pultneytown Steam Shipping Co.*, [1904] App. Cas. 318, where a stevedore's workman, while engaged in discharging pig iron from a ship, was killed by the fall of a block, part of the ship's tackle, and the family of the deceased having brought an action against the shipowner and the stevedore, alleging against the former that he had supplied weak tackle, and against the latter negligence in using it, the jury found both the defendants liable; the House of Lords seem to have treated them as joint tortfeasors."

The courts of this country express no doubt, but hold that in such cases wrongdoers are joint feasors. In *Allison v. Hobbs*, 96 Me. 26, 51 Atl. 245, 246, it is said:

"Again, while it is true that persons who act separately and independently, each causing a separate and distinct injury, cannot be sued jointly, even though the injuries may have been precisely similar in character and inflicted at the same moment, yet if such persons, acting independently, by their several acts directly contribute to produce a single injury, each being sufficient to have caused the whole, and it is impossible to distinguish the portions of injury caused by each, they are then joint tortfeasors, within the rule, and may be sued either jointly or severally, at the election of the plaintiff, and in such an action against one or more the whole damage may be recovered."

In 21 Am. & Eng. Enc. Law (2d ed.) 496, it is said:

"And where the negligence of two or more persons, acting independently, concurrently results in injury to a third, the latter may maintain his action

for the entire loss against any one or all the negligent parties; it not being essential, it has been held, to the maintenance of a joint action against several for negligence, that they should be engaged in a common enterprise, or sustain any relations whatever between themselves."

And in *Corey v. Havener,* 182 Mass. 250, 65 N. E. 69, it is held:

"If two wrongdoers contribute to an injury, they may be sued either jointly or severally; and in the latter case the plaintiff is entitled to judgment against each defendant for the full amount, although it can be satisfied but once."

And see *Barrett v. Railway,* 45 N. Y. 628.

Here the omissions of duty complained of against the traction company are its failure to properly insulate the feed wire; its failure to provide the guy wire with a circuit breaker; its failure to prevent contact of the guy wire with the pole of the telephone company; its failure to prevent the displacement of the feed wire, and its lodgment on the iron spike of the telephone company's pole, and its failure to remove it therefrom; and the omission of duty upon the part of the telephone company are its failure to remove the feed wire from the iron spike, and its failure to prevent the contact of the guy wire with the wooden pole. The omissions of each were concurrent, and contributed to produce a single injury, each being sufficient to have caused the whole. If either had performed the duty which the law imposed upon it, the accident would not have occurred. The omissions concurrently resulted in the injury complained of, and there is no misjoinder of parties.

But it is said that no cause of action is shown against the telephone company, because it does not appear that it had notice of the lodgment of the feed wire upon the iron spike of its pole, or the contact of the guy wire with its pole, and that it cannot be chargeable with constructive knowledge of the conditions of danger created thereby. The petition alleges that:

"Said wires were not properly insulated, and, through the negligence of said Cincinnati Traction Company and the City & Suburban Telegraph Association, one of said wires had been suffered to be and remain for a long time in contact with one of the iron steps aforesaid, and the insulation at the point of such contact to be and remain worn, defective, and imperfect, so that the metal of said wire was in contact with the metal of said iron step or spike."

It appears that this condition had continued for a long time, and this fact, taken in connection with the allegation of negli-

gence, warrants the inference that the exercise of ordinary care in the performance of the duty of inspection of its line of wires and poles would have disclosed to the telephone company those conditions of danger. The indefiniteness of this paragraph might justify a motion to make it more definite and certain, but on demurrer I think it is sufficient.

The demurrer of the defendants will therefore be overruled.

MALONE v. WAUKESHA ELECTRIC LIGHT COMPANY ET AL.

Wisconsin Supreme Court — Feb. 2, 1904.

120 Wis. 485, 98 N. W. 247.

1. ELECTRIC LIGHT POLES IN STREET — CONSENT OF ABUTTING OWNER — CITY ORDINANCE. — Until city authorities have exercised the power given them by ordinance, as to the setting of electric light poles, the property owner's right is paramount, and an electric light company has no power, against the objection of an owner, to place a pole in front of the latter's property.
2. COSTS IN EQUITY. — The owarding of costs is discretionary in equity cases.

Defendant appeals from judgment for plaintiff. *Affirmed.*

Statement of facts by WINSLOW, J.:

This is an action in equity to enjoin the appellant company from placing an electric light pole in the street in front of the plaintiff's premises in the city of Waukesha, and from cutting or trimming the branches of the plaintiff's shade trees in the street. The plaintiff owns and occupies as a homestead a lot in the city of Waukesha with a frontage of 160 feet on Barstow street, and with a number of large shade trees in front of said lot. The defendant is a corporation engaged in furnishing electric light, heat, and power for public and private purposes in said city. March 13, 1902, the appellant entered into contract with the city of Waukesha to light the city with electric light for five years, which contract specified the number and kind of lights to be used, the amount to be paid therefor, and contained provisions requiring the appellant to erect and maintain the necessary plant, poles, wires, etc. Just prior to the making of this contract the city council of the city of Waukesha passed an ordinance purporting to grant to the appellant for twenty years the right to enter upon the streets, alleys, bridges, etc., of the city, and operate and maintain on, over, and under the same poles, wires and the necessary apparatus for supplying electricity for light, heat, and

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Rights of Abutting Owners to Compensation for Use of Streets by Electric Light Companies. — See note to *Callen v. Columbus Edison Electric L. Co.*, 8 Am. Electl. Cas. 243, 251. See also *Brown v. Asheville Electric Light Co., post.*

power, subject to the general provisions of law in force, and also subject to the direction and supervision of the board of public works of the city in the setting of poles and the placing of wires. Under this ordinance the board of public works made a written order June 4, 1902, authorizing the appellant to set poles, and place wires thereon, in certain streets of the city, as provided by said franchise, among which streets was a part of Barstow street, including that part on which the plaintiff's lot fronts, but the order did not specifically designate any particular places in the street where the poles should be put. In the early part of June, 1902, the appellant commenced to build the Barstow street line, and started to dig a hole for a pole on the plaintiff's side of the street at a point in front of the plaintiff's premises. To this the plaintiff objected, and, after some talk between the plaintiff and the defendant's manager, it was agreed that the plaintiff's wife should settle the matter by agreement with the manager. The manager testifies that he agreed with Mrs. Malone that a pole should be permanently set at a certain point near an elm tree in front of the plaintiff's premises. Mrs. Malone, however, testifies that she made no agreement that a pole might be permanently set anywhere, but that the manager told her that a pole must be set somewhere upon that day; that there could be no delay; that he would put up a 20-foot pole at the place near the elm tree, and would remove it whenever required — and that she consented to the temporary placing of the pole on those conditions. As matter of fact, it appears that a pole about thirty feet in height was put in the place thus selected, and that it remained there without wires until August 18, 1902, when defendant's workmen appeared and began to put arms on the pole, and to prepare it for the stringing of wires thereon. Thereupon the plaintiff objected, and ordered the pole removed, and commenced to cut it down. On the same day the board of public works made a written order allowing the appellant to set a pole and string wires on the east side of Barstow street between Main street and the alley (this includes the plaintiff's frontage), but specifying no particular location for the pole. Plaintiff immediately commenced this action against the electric light company alone to enjoin it from putting the pole near the elm tree, and also to prevent the trimming of any of the branches of the plaintiff's trees, and obtained a temporary injunctional order to that effect. The defendant appeared in the action, and, in addition to a defense upon the merits, pleaded by way of abatement that the city should be joined as a necessary party defendant. In connection with the temporary injunctional order, the circuit court further ordered that the matter be referred to Court Commissioner Merton to recommend a place where the pole could be put pending the litigation, without injury to the interests of either party; and the commissioner reported, recommending a place near the point originally selected by the company. This recommendation was practically consented to by both parties, and the pole was put in that place, and has remained there since, with wires strung thereon. The case was tried by the court, and the trial judge, before making findings, decided that the city should be joined as a defendant, so that any judgment rendered might be effective and binding on all parties concerned, and an order was made bringing in the city as an additional defendant. An amended complaint was served, and the city answered thereto; and the case came again to hearing and the evidence taken upon the first hearing was stipulated bodily into the case, with some slight additional tes-

timony. The court, after finding the plaintiff's ownership of the lot, and the defendant's business and franchise, proceeded to find that the plaintiff's shade trees were of great value, and added greatly to the use and enjoyment of the plaintiff's homestead, and that any cutting or trimming thereof would cause irreparable damage to the plaintiff, for which he had no adequate remedy at law, and further: "That on the 18th day of August, A. D. 1902, at the city of Waukesha, in the state of Wisconsin, the said defendant Waukesha Electric Light Company, having been previously warned by the plaintiff not to interfere with his possession and the enjoyment of his premises, and the trees thereon, by its agents, servants, and employees, claiming to act by and under the direction of the city of Waukesha, and in accordance with the franchise to it granted by said city, and under the contract made with said defendant city, wilfully, maliciously, and wantonly, and with intent to injure the plaintiff in the possession and enjoyment of his property, went upon the premises of the plaintiff with force and arms, and against the consent of the plaintiff, and in derogation of his rights, started to place electric wires, to be charged with electricity, on a certain pole, of the probable height of thirty feet, placing crossarms on said pole, among the limbs and branches of one of said elm trees; the said pole having been placed there fraudulently on or about the month of June, A. D. 1902, by said defendant light company, which said pole was placed in the ground a few feet from the base of said elm tree, so that the top thereof, and where the crossarms are, and the wires were to be placed, were within the tree, requiring, and said defendant contemplated, the cutting of the limbs and branches thereof; said pole being located on the premises of the plaintiff, between the sidewalk and curb line; and the said defendant light company did then and there, without warrant or authority of law, threaten and attempt to place crossarms on said pole for the purpose of stringing thereon live electric wires for the transmission of power for public as well as private purposes, in close proximity to the residence of the plaintiff, and did then and there threaten to commit personal violence on the plaintiff when endeavoring to protect his trees and property from the encroachments of said defendants; and that the defendants threaten that, unless restrained by injunction, they will continue to interfere with the plaintiff in the enjoyment of said premises, and will cut, trim, injure, and destroy the said tree, and other trees, and will greatly injure the homestead of the plaintiff, and that he has no adequate remedy at law in the premises, and that to proceed in the manner they intend and threaten would be of irreparable damage to the plaintiff. That all the allegations of plaintiff's complaint, except as modified by these findings, are true, and that the placing of the said pole and the wires among the branches of the plaintiff's trees, and the cutting, mutilation, or trimming of the said tree or trees, was wholly unnecessary in order that the said defendant carry out its contract with the defendant city under the franchise hereinabove referred to. That said wires could be placed and strung without touching the trees of the plaintiff. (10) That the said defendants have not acquired the right to take or appropriate the premises and trees of the plaintiff by condemnation proceedings under the laws of the state of Wisconsin, nor has an attempt so to do been made. (11) That on or about the 4th day of June, A. D. 1902, the board of public works of said defendant city, by order, directed and authorized the placing of poles by the said defendant light company on Barstow street, without

designating the point of location, nor the side of the street on which the same were to be placed; but, after the trouble had arisen between the plaintiff and the said defendants, the defendant light company was ordered to place a pole on the east side of Barstow street, and in fact the said pole has been there since June, and in the place so obnoxious to the plaintiff, herein complained of." As conclusions of law, the court found that the plaintiff was entitled to have the temporary injunctional order made permanent, but that the appellant should have the right to place a pole at a point in front of the plaintiff's premises, forty-seven feet south from the southeast corner of Barstow and Main streets. Judgment was rendered in accordance with these findings against both defendants, but it was adjudged that the plaintiff recover costs of the appellant alone, and from this judgment the appeal is taken.

T. W. Haight, for appellant.

D. J. Hemlock, for respondent.

Opinion by WINSLOW, J.:

There is a very important question which might well have been litigated and decided in this case, and that is the question whether the placing of poles in the street by an electric lighting corporation for the purpose of placing electric light and heat wires thereon is an additional burden upon the fee, so as to require condemnation proceedings, as against the adjoining owners. The question does not seem to have been seriously considered in the court below, and it has not been argued in this court; and, in view of its great importance, and the fact that this case may be properly decided without reference to it, we shall not take it up, but wait until it may be fully presented on argument and authority.

Conceding, for the purposes of the case, that the franchise granted by the city council gave to the electric light company the right to place its poles in the streets without condemnation, it did not give the right to place those poles anywhere that the company might choose, against the consent of the lot owner. Under the terms of the law governing this subject in cities of the class to which Waukesha belongs, the time and manner of using the streets for placing electric light poles therein shall be determined by the board of public works, subject to review by the common council. Section 925–88, Rev. St. 1898. Such, also, are the terms of the ordinance or franchise passed by the common council. There can be no doubt that, until the board of public works has designated the particular places where the poles are to be placed,

the electric light company has no power, against the objection of the owner, to place a pole in front of a man's property. Until the city authorities have exercised the power given them, the property owner's right must be paramount. It appears by the findings in the present case, upon sufficient evidence, that neither the board of public works nor the city council ever authorized a pole to be put at the point where the company had put it when this action was commenced, nor did they ever authorize the trimming of trees for the purpose. Until such authorization had been made, the rights of the plaintiff must be considered to be absolute, and it follows from this that the judgment must be affirmed.

Costs were adjudged against the electric light company alone, and this is assigned as error; but, as the awarding of costs is discretionary in equity cases, and no abuse of discretion appears, there can be no reversal of this part of the judgment.

A motion by respondent upon the argument to dismiss the appeal because of alleged defects in the notice and undertaking is overruled, without costs, and is not deemed of sufficient importance to require discussion.

Judgment affirmed.

MARTINEK v. SWIFT & CO.

Iowa Supreme Court — Feb. 5, 1904.

117 Iowa 671, 98 N. W. 477.

1. DEATH — SHOCK FROM ELECTRIC LIGHT — LIABILITY OF CONSUMER — DEFECTIVE CONVERTER. — In an action against a consumer of electricity for death caused by a shock received from an electric light, the converter being in a defective condition, *held* that the consumer, having no control or authority over any part of the light and power company's plant, wires, or converters, cannot be charged with liability for their defective condition.

Liability of Consumer for Injuries from Electric Shock. — A company lighting its buildings with electricity was not negligent in failing to make an inspection of the wires, where the electric system, including the wire causing an accident, had only been installed for a few months and there was nothing in the case to suggest that the insulating material covering the wire would not have remained intact for many years. *Fulton v. Grieb Rubber Company*, 8 Am. Electl. Cas. 669, 54 Atl. 561.

supplied by induction. From this imperfect description of the two circuits it will at once be seen that if the converter in a given case is in proper order, and is doing its work as it should be done, no greater voltage can reach the secondary circuit from the primary than the secondary is intended to receive.

After the death of Martinek, the light and power company examined and tested the primary and secondary circuits, and found the converter in such condition that the 1,000 volts of the primary wires had passed to the secondary wires of the circuit, and it is therefore beyond dispute that this powerful current passed through the body of Martinek. There was no danger to life in the current of 100 volts which the secondary wires carried to the consumer, but this is not of great importance here, for, as we have seen, Martinek received and was killed by the current from the primary wires passing through the defective or broken-down converter to the secondary wires.

Upon the trial the plaintiff, over the defendant's objections, attempted to prove acts of negligence on the part of the defendant not pleaded. These matters we shall consider later, and now consider those which were pleaded. There is no evidence tending to support the charges of negligence in stapling the wire on the outside of the car, or in passing it over the iron hooks on the inside thereof. The evidence shows, however, that the insulation was worn off of the wire where it passed through the car door, and that it was there stapled to the frame of the car, but it is not claimed that the deceased was in contact with the wire at this point. The evidence tends to prove, however, that the wires may have been partially grounded by reason of this open contact with the car, but, if that were true, it is unquestionably true also that such grounding of the wires would afford a path to the ground for any current of electricity passing through them, for all of the witnesses agree that electricity always seeks the ground by the shortest route possible. It follows, then, that the absence of insulation at the point in question and the stapling of the wire to the car could by no possibility have contributed to the death of Martinek.

The negligence alleged in not providing proper appliances for arresting lightning is entirely without proof in its support. There had been an electrical storm that morning an hour or so before

Martinek was killed, but at the time of his death there was no storm; it had long since passed away, and the morning was then bright and clear. Furthermore, there is no evidence tending to show that the lightning struck this circuit.

Though not alleged as grounds of negligence, the plaintiff was permitted to offer evidence to the effect that it was dangerous to use a brass socket at the end of the wires, and dangerous to use a wire screen over the lamp. This testimony was improperly admitted under the issues, as we have already seen, but, notwithstanding this, we will consider it as properly in the case for the purpose of making final disposition thereof. The superintendent of the light and power company testified for the plaintiff that it was dangerous to use a brass socket without insulation, and that if a porcelain socket had been used in place thereof 1,000 volts of electricity would not have produced death. This testimony is entirely unsupported by the testimony of other witnesses, and is in fact contradicted by all of the experts who testified touching the matter, including those used by the plaintiff. It is said, however, that because he so testified the question was for the jury, and that its finding should not be disturbed. It is not true, however, that because there is testimony on a given point it must go unchallenged. This witness stated that he did not pretend to be an expert electrician, and his entire testimony on the subject of electricity conclusively demonstrates that he is not an expert, and that he in no measure underestimated his knowledge on the subject. In addition to this, it is undisputed that there were four or five other consumers on this same secondary circuit, and that an employee of one of them received a current of electricity through a porcelain socket which he just touched with his fingers, which knocked him down and rendered him unconscious. This occurred about thirty minutes before Martinek was killed, and it is probable that this other man would have been killed also had he held the socket in his hand. He fell, however, and broke the connection, which probably saved his life.

But aside from this it was not negligence for the defendant to use a brass socket. They were then in universal use on secondary circuits, not only in Cedar Rapids, but everywhere, and were then and are now considered absolutely safe so far as danger to life is concerned. The fact that they will not resist a current of

1,000 volts is not proof of negligence, for the defendant only co tracted for a safe commercial current of electricity, and was bou only to supply proper appliances for its safe use. We are co strained to hold that the evidence on this branch of the case wholly insufficient to support the verdict.

Testimony was also erroneously received that a horseshoe hu over the wires leading out of the defendant's office on the morni in question, and that its position, if it was in contact with t building, would have a tendency to ground the wire and to bre down the converter, and to induce the 1,000 voltage to the seco ary circuit; but, even if this most improbable effect could ha been produced by the position of the shoe, it is not shown that defendant put the shoe there, or when it was in fact placed the or that the defendant knew that it was there until after the de of Martinek. Moreover, no direct evidence shows that it was contact with the building. The only thing supporting such the is an inference from the fact that it was hot when taken do To predicate negligence on the position of this shoe it was ne sary to prove that the defendant was in some way responsible its being there at the time of the accident, and there is absolu no proof of such fact.

Unless the defendant in some way caused the defect in the verter it cannot be charged with liability for its defective co tion. It was a consumer only, having no control or autho over any part of the light and power company's plant, wires converters. The secondary circuit was brought by the com

The eighth instruction was the law of the case, whether right or wrong, and should have been followed by the jury, and a verdict returned thereunder for the defendant.

Instruction ten asked by the defendant should have been given. It told the jury that if a verdict was found against the defendant it could not recover the amount from the light and power company.

The jury should have been instructed to find for the defendant on the whole case. It is unnecessary to mention other errors. For those pointed out, the judgment is reversed.

BROOKS v. CONSOLIDATED GAS COMPANY OF NEW JERSEY.

New Jersey Court of Errors and Appeals — Feb. 29, 1904.

70 N. J. L. 211, 57 Atl. 396.

1. CARE REQUIRED BY ELECTRIC LIGHT COMPANY IN TRANSMITTING CURRENT. — A company transmitting a current of electricity of dangerous power, through wires, to a converter placed by it on the side of a dwelling house near to a balcony upon the tin roof of a portion of the first story thereof, having a gutter and leaders therefrom to the ground, owes a duty to any one lawfully using the balcony to take reasonable care to prevent the escape of the current in case of contact with the wires without fault on his part.

   The duty required in such case includes the exercise of a reasonable provision as to the possibility and probability of one using the balcony for a lawful purpose coming in contact with the wires.

2. EVIDENCE. — Evidence that the company protected the wires by insulation commonly used when the converter is installed at the top of a pole did not require a nonsuit or a direction for a verdict, when the evidence disclosed that more effective insulation could have been employed, or other protection furnished. Upon such evidence, it was a question for a jury whether the company had performed its duty.

   Upon evidence justifying the inference that plaintiff's intestate went upon the balcony for the purpose of painting the gutter in the exercise of his duty as caretaker of the house; that he had been warned of the

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Care Required by Electric Light Company. — The following cases establish the rule that electric light companies should exercise the highest degree of care practicable in transmitting current: *Daltry v. Media L., H. & P. Co., post; Shawnee L. & P. Co. v. Sears*, 95 Pac. 449; *Weir v. Haverford Electric Light Co., post; Wilbert v. F. Zurheide Brick Co., post; Cutler v. Putnam L. & P. Co.*, 80 Conn. 470; *O'Leary v. Glens Falls Gas and Electric Light Co., post; Younie v. Blackfoot Light & Water Co.*, 15 Idaho 56.

See generally, as to care required of electrical companies, note to *Guest v. Edison Illuminating Co., post.*

danger of contact with the wires, and had replied that he was not afrai of them; that he was shortly afterward found dead or dying, leanin over a balustrade, with a paint brush in his right hand, touching th gutter, and with his left hand firmly grasping one of the wires, whic was within easy reach of him — *held*, that it was not erroneous to refus to direct a verdict for a defendant on the ground of the conduct of de ceased, for the evidence did not require the inference that deceased ha intentionally grasped the dangerous wire, and a jury might infer tha his left hand had been accidentally, by some unintentional movement o it in the prosecution of his work, brought into contact with the wire and made to grasp it convulsively by reason of the strong current.

3. INSTRUCTIONS. — After the trial judge had properly charged that it wa the duty of persons using a dangerous agency to exercise a high degre of care to prevent injury to persons who, in the exercise of a lawfu right, might come in contact therewith, he then added: "The usual rul applies, and that is that they are charged with introducing the agenc by the use of the best known means and appliances for so doing." *Hel* that there was no error in this instruction, which imposed no duty bu that of inquiring for and selecting the means of safely using the dange ous current of electricity which are best known for that purpose.

(Syllabus by the Court.)

Error by defendant from judgment for plaintiff. *Affirmed.*

Edwin A. S. Lewis, for plaintiff in error.

Samuel A. Patterson, for defendant in error.

Opinion by MAGIE, Ch.:

This writ of error brings up a judgment of the Supreme Cou affirming a judgment of the Monmouth Circuit Court entered up the verdict of a jury finding the defendant company liable for t

death, as disclosed by evidence which the jury might credit, with such reasonable inferences therefrom as the jury might draw, are the following: He was in the employ of one Asiel, and in charge, as care taker, of Asiel's house at Long Branch. His employer and family had left the house, and the deceased was living with his family in the stable on the premises. Among the duties of the deceased, he was required to watch for and repair leaks in the roofs and shingles of the house. On the day in question he went, accompanied by his young son, upon a balcony extending over a part of the first story, and accessible only from the house. The balcony had a tin floor, with a gutter and leaders therefrom. There was a railing nearly four feet in height, the gutter being on the outside thereof. Deceased engaged in painting the gutter, leaning over the railing. The son was playing on the floor of the balcony. No other person was within observation. Some exclamation from the deceased called the son's attention, and he observed that his father was leaning over the railing, with his paint brush in his right hand, in the gutter, while his left hand grasped a wire at the side of the house. The wire was one by which the defendant company furnished a current of electricity for the lighting of the house. At Mr. Asiel's request, the current had been shut off from the house, but continued to flow through the wire which deceased had in his grasp. The son endeavored to pull his father away, receiving a severe shock himself. Others who came shortly found the deceased in the position described by the son. They extricated the body, and made efforts to resuscitate him, without result. They noticed that the left hand was severely burned, with rubber blisters therein, and that the insulation of the wire which he had grasped was pulled down, exposing the wire for some inches.

It is clear that the inference that plaintiff's intestate was killed by a current of electricity transmitted by the defendant company through the wire in question, which operated to produce injury by passing through his body to the tin floor of the balcony, and thence, by the leaders, to the ground, was one which the jury might justifiably make. But this inference alone would not establish defendant's liability to answer in damages for the death. It must further appear that, in transmitting the current through the wire in the condition it then was, the defendant company was negli-

gent in some duty which it owed to the deceased. The defendant company furnished a current for lighting Asiel's house by an overhead system of wires carried upon poles. In the ordinary course of business, a pole near the house would have been furnished with a device called a "converter" or "transmitter," from which the wires would have run to the house. The wires running to and from this instrument, in general, are wound with some insulating device, which, it is conceded by the expert witnesses, would not protect anybody from a shock if the wires were grasped by the hand when the body was in a position to complete the circuit to the ground. Asiel objected to having a pole erected on the grounds, and required the defendant company to put the transmitter upon the side of his house, which the company did. The position in which it was placed was about six or eight inches away from the corner of the projection on the side of which the balcony was. The bottom of the instrument was about at the height of the top of the railing. It was therefore within easy reach of any one standing on the balcony, or working there, or in the gutter attached thereto. There was also evidence tending to show that there were insulating devices which would have protected these wires, and prevented the escape of the current therefrom. It is obvious from an inspection of the photograph accompanying the brief presented on the part of the defendant company that some barrier might have been erected which would have prevented any one standing on the balcony from reaching or coming in contact with the wires. The contention on the part of the company is that, when it had used that form of insulating protection which was usually employed in overhead construction, it had done its full duty, and cannot be held responsible because the insulation failed to protect. But in my judgment, this is too narrow a view of the company's duty. When it placed its converter on the top of a pole fifteen or twenty feet high, to which no one not connected with the company would be likely to have access, the rule of duty contended for would probably be properly applied. But when it placed its converter on the side of the house, although at the owner's request and with his permission, and in a place where persons on the balcony might come in contact therewith, the rule of duty was obviously more severe. When it sent its dangerous current through the wires thus exposed, it was bound to take such care for

the protection thereof as reason required to be done. As was well said by Mr. Justice Garrison, in the Supreme Court, the required care demands more than mere mechanical skill, and includes circumspection and foresight with regard to reasonably probable contingencies. *Anderson v. Jersey City Electric Light Co.*, 7 Am. Electl. Cas. 557, 63 N. J. Law, 387, 43 Atl. 654. When it placed its converter in the position indicated, it was bound to consider and foresee the possibility and the probability of some one, using the balcony for pleasure, or for working thereon, coming in contact with the wires and receiving injury thereby, and to take such precautions as might be reasonably taken against such results. This duty it owed to every person lawfully using the balcony. Whether the company did take such precautions and exercise such care as the circumstances demanded was plainly a question for the jury.

There was evidence from which the contributory negligence of deceased might, perhaps, be inferred, but none so conclusive as would justify an instruction for the defendant. It was shown that deceased had been warned by an employee of the defendant company of the danger in coming in contact with the wires. There was also evidence that a person warned deceased on the morning of his death, and upon learning that he was going to work on the balcony, that the wires were dangerous, and that deceased replied that he was not afraid of them. When first found, the left hand of deceased was firmly clasped upon the wire. If it be inferred therefrom that deceased deliberately took hold of the wire, either to show that he was not afraid of it, or for some other reason, his conduct was negligent; and, if such was the only inference possible, a direction for a verdict would have been proper. *Anderson v. Jersey City Electric Light Co.*, 64 N. J. Law, 664, 46 Atl. 593. But that inference was not a necessary one. Considering the warnings he had received, his declaration that he was not afraid of the wires may be intended to indicate that the work he was about to do would not put him in danger. And a reasonable inference from the circumstances may be drawn that when deceased leaned over the balustrade, engaged in painting the gutter, his left hand may have been placed upon the corner of the house, and by an unexpected slip have been caught in the loop of the wire. Whether, upon such inference, he was guilty of

gent in some duty which it owed to the deceased. The defendant company furnished a current for lighting Asiel's house by an overhead system of wires carried upon poles. In the ordinary course of business, a pole near the house would have been furnished with a device called a "converter" or "transmitter," from which the wires would have run to the house. The wires running to and from this instrument, in general, are wound with some insulating device, which, it is conceded by the expert witnesses, would not protect anybody from a shock if the wires were grasped by the hand when the body was in a position to complete the circuit to the ground. Asiel objected to having a pole erected on the grounds, and required the defendant company to put the transmitter upon the side of his house, which the company did. The position in which it was placed was about six or eight inches away from the corner of the projection on the side of which the balcony was. The bottom of the instrument was about at the height of the top of the railing. It was therefore within easy reach of any one standing on the balcony, or working there, or in the gutter attached thereto. There was also evidence tending to show that there were insulating devices which would have protected these wires, and prevented the escape of the current therefrom. It is obvious from an inspection of the photograph accompanying the brief presented on the part of the defendant company that some barrier might have been erected which would have prevented any one standing on the balcony from reaching or coming in contact with the wires. The contention on the part of the company is

the protection thereof as reason required to be done. As was well said by Mr. Justice Garrison, in the Supreme Court, the required care demands more than mere mechanical skill, and includes circumspection and foresight with regard to reasonably probable contingencies. *Anderson v. Jersey City Electric Light Co.*, 7 Am. Electl. Cas. 557, 63 N. J. Law, 387, 43 Atl. 654. When it placed its converter in the position indicated, it was bound to consider and foresee the possibility and the probability of some one, using the balcony for pleasure, or for working thereon, coming in contact with the wires and receiving injury thereby, and to take such precautions as might be reasonably taken against such results. This duty it owed to every person lawfully using the balcony. Whether the company did take such precautions and exercise such care as the circumstances demanded was plainly a question for the jury.

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negligence in thus placing his left hand, was a fair question for the jury.

One other assignment of error has been argued. It was directed to a sentence of the charge of the learned justice which was excepted to. It was in the following words:

> "The usual rule applies, and that is that they are charged with introducing the agency by the use of the best known means and appliances for so doing."

This followed a statement of the duty of persons using a dangerous agency to exercise a high degree of care to prevent injury to persons who, in the exercise of a lawful right, come in contact with such agency. Taken in its connection, the particular sentence now urged as erroneous is not deemed to impose upon the defendant company any other duty than that of inquiring for and selecting the means of safely using the dangerous current of electricity which are best known for that purpose. This is familiar law, and the charge in that respect was not injurious to defendant.

No error being found, the judgment will be affirmed.

SPIRES v. MIDDLESEX & MONMOUTH ELECTRIC LIGHT, HEAT & POWER CO.

New Jersey Supreme Court — March 1, 1904.

70 N. J. L. 355, 57 Atl. 424.

1. INJURY TO TRAVELER FROM BROKEN ELECTRIC LIGHT WIRE IN STREET. — Where a traveler was driving along a highway when his horse fell down, and he jumped from the wagon and was rendered unconscious from a shock from a broken electric light wire, which crossed the road diagonally and had been parted by a heavy limb falling upon it, it was held that the light company was negligent.

Injuries to Travelers from Contact with Wires in Streets — Liability of Electric Company. — See note to *Ela v. Postal Telegraph Cable Co.*, 8 Am. Electl. Cas. 423, 427, and to *Cleary v. St. Louis Transit Co., post.*

Other cases in this volume relating to injuries from contact with electric light wires in the streets. *Wolpers v. N. Y. & Queens Electric L. & P. Co., post; O'Leary v. Glens Falls Gas and Electric Light Co., post; Mayor v. Thomas, post; Shawnee L. & P. Co. v. Sears*, 95 Pac. 449; *Lydston v. Rockingham County L. & P. Co.*, 70 Atl. 385; *Wilbert v. F. Zurheide Brick Co., post.*

2. ELECTRIC LIGHT COMPANIES — DEGREE OF CARE — USE OF GUARD WIRES. — In view of the dangerous nature of electric light wires, corporations using public highways for such wires should exercise a high degree of care. The likelihood of such wires being broken by the falling of the limb of a tree is much lessened by guard wires placed over them and running parallel with them.

3. CONTRIBUTORY NEGLIGENCE. — Where a traveler jumps from his wagon to see what has caused his horse to fall, and is injured by an electric shock, he is not negligent as a matter of law, although a bright flame appeared at the contact between the horse and a broken electric light wire in the street.

Rule to show cause why a new trial should not be granted on a verdict for plaintiff. *Rule discharged.*

Before GUMMERE, C. J., and DIXON, HENDRICKSON, and SWAYZE, JJ.

Thomas B. Hall, for the rule.

Edmund Wilson, opposed.

Opinion by GUMMERE, C. J.:

The plaintiff in this case seeks to recover from the defendant company compensation for personal injuries received by him on the night of the 30th of May, 1902, under the following circumstances: He was driving along the public highway leading from South Amboy to Cliffwood, with his family, when his horse fell down. He jumped from the wagon and walked toward the horse, in order to ascertain what the trouble was. As he approached the animal, he was suddenly knocked down and rendered unconscious by a shock received from a broken electric light wire of the defendant company, which lay across the road. Whether he actually came in contact with the wire itself, or with the body of his horse, which was killed by the electric current, is uncertain, from the evidence, although it seems more probable that he came in contact with the wire. On these facts the jury rendered a verdict in favor of the plaintiff. The defendant now asks a new trial upon three grounds: First, that no negligence was shown on the part of the company; second, because contributory negligence was shown on the part of the plaintiff; and, third, because the damages are excessive.

We think the finding of the jury that the company was negli-

gent was justified by the facts shown. The wire which was broken crossed the highway diagonally at the place where the accident happened. The parting of the wire was caused by the falling upon it of a heavy limb which had broken from a tree which stood some feet away. In view of the dangerous nature of a wire charged with a powerful electric current, corporations using public highways for wires that are so charged should exercise a high degree of care to keep the wires where travelers will not be likely to come in contact with them. The likelihood of such a wire being broken by the falling of the limb of a tree upon it is much lessened by a guard wire stretched over it and running parallel with it, and juries are justified, in proper cases, in holding that such a safeguard is due to the public, and that its absence speaks negligence. *Rowe v. N. Y. & N. J. Tel. Co.*, 7 Am. Electl. Cas. 6261, 66 N. J. Law, 19, 48 Atl. 523.

The question of the contributory negligence of the plaintiff was also plainly a jury question. The proofs show that at the point of contact between the wire and the horse a bright flame appeared, and the contention of the defendant is that it was negligence on the part of the plaintiff to approach the horse under the circumstances. But even if it be assumed that the plaintiff observed the light, which he denies, there is nothing in the case to charge him with knowledge that it was produced by the contact of the body of his horse with a wire charged with an electric current. And even if he had been aware of that fact, it cannat be declared, as a matter of law, that he was negligent in what he did. As was said by the Court of Errors and Appeals in the case of *N. Y. & N. J. Tel. Co. v. Bennett*, 7 Am. Electl. Cas. 543, 62 N. J. Law, 745, 42 Atl. 759, how much such a person as the plaintiff would know of the danger indicated by the presence of the flame, what inferences he ought to have drawn from what he saw, and whether, on the whole, his conduct showed less than reasonable caution, were entirely within the domain of fact.

Nor do we think that a new trial should be directed upon the ground that the damages are excessive. The plaintiff was at the time of the accident a strong and vigorous man, in the prime of life, forty-five years of age. The injuries received by him were very painful and severe, and in all probability permanent, affecting him both mentally and physically. Although the sum

awarded him by the jury ($3,258) was large, we cannot say that it was more than the just compensation which he was entitled to receive from the defendant.

The rule to show cause will be discharged.

WOLPERS v. NEW YORK & QUEENS ELECTRIC LIGHT & POWER COMPANY.

New York Appellate Division, Second Department — March 4, 1904.

91 App. Div. 424, 86 N. Y. Supp. 845.

1. INJURY FROM CONTACT WITH LIVE WIRE IN STREET — PRESUMPTION OF NEGLIGENCE. — In an action brought to recover damages for personal injuries which the plaintiff sustained by coming in contact with an electric light wire belonging to the defendant corporation which had fallen into a city street, the falling of a wire raises a presumption of negligence on the part of the defendant.
2. SAME — WHAT EXPLANATION PRESENTS QUESTION FOR JURY. — Where the defendant offers no explanation of the accident, except to show that a storm had occurred on the night previous to the morning on which the accident happened, and confines its testimony to showing it exercised care in constructing, maintaining, and inspecting the wire, the question whether it had discharged the duty incumbent upon it, is for the jury to determine, and they may properly find against the defendant on that issue.
3. SPECIFIC CAUSE OF ACCIDENT NEED NOT BE SHOWN. — In such a case the plaintiff is not obliged to point out the specific cause of the accident, it is sufficient for him to prove facts and circumstances from which the jury may fairly infer that the wire was either defective in its construction or was negligently operated.
4. SAME — CONTRIBUTORY NEGLIGENCE. — While the plaintiff in an action brought to recover damages for personal injuries is bound to establish his freedom from negligence contributory to the accident, if all the circumstances under which the injury was received are proved, and the evidence excludes fault on the part of the plaintiff and there was nothing in the conduct of the plaintiff, either of acts or of neglects, to which the injury might be attributed in whole or in part, due care may be inferred from the absence of all appearances of fault.

Appeal by the defendant from a judgment of the Supreme Court in favor of the plaintiff and from an order denying the defendant's motion for a new trial. *Affirmed.*

Injuries from Contact with Wires in Streets. — See note to *Spires v. Middlesex & Monmouth Electrict Light, Heat & Power Co., ante.*

Before HIRSCHBERG, P. J., and BARTLETT, WOODWARD, JENKS, and HOOKER, JJ.

John Notman (*Lewis H. Freedman,* on the brief), for appellant.

Melville J. France (*Abram H. Dailey,* on the brief), for respondent.

Opinion by WOODWARD, J.:

Conrad Wolpers, Jr., on the morning of the 22d of January, 1903, between 6:35 and 7 o'clock, was driving a covered butcher wagon through Jackson avenue, Long Island City. When he reached a point about opposite the courthouse his horse fell upon his knees, and, upon being pulled up by the reins, the horse refused to respond. Wolpers jumped out of the wagon over the forward wheel, for the purpose of ascertaining what was the trouble with his horse, when he came in contact with a grounded wire of the defendant, receiving a shock which rendered him unconscious. When found, the wire lay across his breast, and appeared to be held in one of the hands of Wolpers, and witnesses describe it as burning when it was removed by a letter carrier, who protected himself by using a newspaper to take hold of the wire. There is no dispute that this wire belonged to the defendant, that it was one of the wires used in transmitting an electric current for light and power, and that it was carrying a voltage of 2,000 volts, the lines crossing the street and over the trolley wires of one of the local street surface railroads. The plaintiff was unable to tell anything about the accident farther than that when he jumped out of the wagon his foot came in contact with this wire, that he felt it tingle like needles in his feet and all over him, and that he then became unconscious. There were no eyewitnesses of the accident at the moment of the contact, although it would appear from the fact that only the right hand of the plaintiff was injured, and this only as to two or three fingers, that he must have been discovered almost immediately after the contact; and there was no room to doubt the cause of the injury, for the wire was in his hand when discovered, although he testifies that he has no recollection of seeing the wire or of having hold of it. The case was submitted to the jury, resulting in a verdict for $5,000, and, from the judgment entered, appeal comes to this court.

The defendant, on this appeal, apparently concedes that the falling of the wire raises a presumption of negligence on its part; but it is urged that this was fully rebutted by the testimony in the case bearing upon the question of the defendant's care in inspecting and repairing the lines, its use of the customary materials, and the general system commonly used for like purposes. It is true that the case does present evidence from which the jury might have drawn the inference of care on the part of the defendant in the construction and operation of its lines, but whether the degree of care which the evidence shows to have been exercised met the duty of the defendant toward those lawfully using the highway was peculiarly a question of fact for the jury, under proper instructions. The management and control of the wire was exclusively in the defendant; the accident was one which in the ordinary course of business does not happen if reasonable care is used; and the fact that the wire fell, producing the injuries for which the plaintiff complains, under the facts and circumstances disclosed by the evidence, affords sufficient evidence that the accident arose from want of care on the defendant's part. *Griffin v. Manice,* 166 N. Y. 188, 194, 59 N. E. 925, 52 L. R. A. 922, 52 Am. St. Rep. 630, and authorities there cited.

The defendant introduced evidence to show that it had exercised some care in the construction and operation of its line, and there was some more or less negative testimony that the wire was not down within a few minutes of the time of the accident; but this testimony need not have been very convincing to a jury, for it was in substance that the witnesses did not see the wire down, which might be entirely true, and yet the wire may have been down, for the hour was early, just about daylight, and an electric light wire is not a very conspicuous object. On the other hand, the plaintiff proved, or gave evidence tending to prove, that an elevator in a hospital near at hand, and which was served by the defendant, would not run at six o'clock that morning, and, while it was not shown that there was no other reason for its failure to act, the circumstance was one which might properly be taken into consideration. If the fact of the wire falling, under the circumstances described, constituted a *prima facie* case, calling upon the defendant for an explanation, it seems clear that it was for the jury to determine whether the explanation offered was such

called, but have not found error justifying a reversal of this judgment.

The judgment and order appealed from should be affirmed, with costs. All concur.

STATE v. BLOCK.

New Jersey Supreme Court — March 7, 1904.

70 N. J. L. 398, 57 Atl. 391.

ELECTRIC LIGHT METER — UNLAWFUL TAMPERING — EVIDENCE. — Upon the trial of an indictment under the Act of March 22, 1899 (P. L., p. 210, c. 85), which charged the defendant with having unlawfully tampered with the meter of an electric light company which supplied him with electric light, thereby preventing the meter from recording or measuring the full amount of the current supplied to him, fixing the date of the offense September 3, 1902, it was satisfactorily proven that on the day named the meter was found to have been tampered with by removing the seal and inserting a pin between the disc and magnets, so that, although the current was passing to the lights which were burning, the disc did not rotate and cause the current to be recorded or measured, as it was its office to do, so that the only question left for the jury was as to whether the defendant had been connected with the tampering with the meter. The defendant offered to prove by the books of the company the amounts charged to him during the years 1901, 1902, and 1903, with the purpose of showing the absence of any discrepancy in the amount charged for the month during which the tampering occurred, and also for the purpose of affecting the credibility of a witness for the state. The offer was overruled by the trial judge. *Held*, on error, that the evidence offered, if relevant at all, bore so remotely upon the issues involved, that its admission or rejection was within the discretion of the trial judge, so that its rejection was no ground for reversal.

(Syllabus by the Court.)

Error by defendant from judgment for plaintiff. *Affirmed.*

Before GUMMERE, C. J., and DIXON, SWAYZE, and HENDERSON, JJ.

J. Emil Walschied, for plaintiff in error.

William H. Speer, for the State.

Opinion by HENDRICKSON, J.:

The plaintiff in error was convicted in the Hudson Quarter Sessions of a misdemeanor, upon an indictment based upon the statute entitled "An act to punish persons who unlawfully obtain

electric power," approved March 22, 1899 (P. L. 1899, p. 210, c. 93). The indictment charged the defendant below with having in his possession on September 3, 1902, at the town of Union, in said county, a certain meter, for the purpose of registering and recording the amount of electric current then and there supplied to him by the United Electric Company of New Jersey, and with wilfully, unlawfully, and without the permission and authority of said company, tampering with said meter, by then and there inserting a pin between the disc and magnets thereof in such manner that said meter did not record or measure the full amount of electric current supplied to him, he being then and there a customer of said company. The defendant has brought error, under which he now challenges the validity of the conviction.

The trial judge overruled defendant's offer to show by the company's books the amount of electricity consumed by the defendant during the years 1901, 1902, and 1903, to date. While the record does not show the purpose of the offer, it was presumably made to show whether there was any falling off in the quantity registered during the period covered by the alleged tampering with the meter. It is urged that the overruling of this evidence was reversible error, on the ground that one of the facts to be proved was that, by reason of the tampering, the meter did not measure or record the full amount of electric current supplied to him. In examining this question, it should be observed that the charge was not the unlawful abstraction of any particular amount of the electric current, but with having on one particular day, September 3, 1902, tampered, etc., so that the meter did not measure, etc., the full amount, etc., and also the fact that within an hour after the discovery of the tampering, the wire was cut by the company's agents, stopping the defendant's supply. The charge does not relate to such criminal conduct before or after the alleged date. The absence or presence of any limited discrepancies in the current charged to the defendant during the several years named, or during the months of said years, would obviously throw little, if any, light upon the charge in the indictment, and hence the evidence offered would be irrelevant, as being too remote, and not properly admissible. But granting that under some circumstances such evidence might be admissible, I think, under the facts and circumstances proved, the evidence offered was so remote from

called, but have not found error justifying a reversal of this judgment.

The judgment and order appealed from should be affirmed, with costs. All concur.

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(Syllabus by the Court.)

Error by defendant from judgment for plaintiff. *Affirmed.*

Before GUMMERE, C. J., and DIXON, SWAYZE, and HENDERSON, JJ.

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The trial judge overruled defendant's offer to show by the company's books the amount of electricity consumed by the defendant during the years 1901, 1902, and 1903, to date. While the record does not show the purpose of the offer, it was presumably made to show whether there was any falling off in the quantity registered during the period covered by the alleged tampering with the meter. It is urged that the overruling of this evidence was reversible error, on the ground that one of the facts to be proved was that, by reason of the tampering, the meter did not measure or record the full amount of electric current supplied to him. In examining this question, it should be observed that the charge was not the unlawful abstraction of any particular amount of the electric current, but with having on one particular day (September 3, 1902) tampered, etc., so that the meter did not record, etc., the full amount, etc., and also the fact that within an hour after the discovery of the tampering, the wire was cut by the company's agents, stopping the defendant's supply. The charge does not relate to such criminal conduct before or after the alleged date. The absence or presence of any decided discrepancies in the amount charged to the defendant during the several years named, or during the months of said years, would obviously throw little, if any, light upon the charge in the indictment, and hence the evidence offered would be irrelevant, as being too remote and not properly admissible. But granting that under some circumstances such evidence might be admissible, I think, under the facts and circumstances proven, the evidence offered was so remote from

the issue that there was no error in overruling it. Three officers and employees of the company, thoroughly familiar with the working of the meter and its mechanism, called at defendant's store on the day in question to inspect his meter; and they all testified to finding that the seal of the meter had been tampered with, and that a black pin or wire was inserted between the disc and magnets, so that the former could not rotate as it usually did, and as was necessary in order to measure the current passing through, and that while there the lights in the store were burning, and the current was passing through, but the disc did not rotate, because of the pin, and that after they removed the pin the disc rotated as usual. The defendant came in while the inspection was going on, and remained ten or twelve feet away, and his only remark was, "I know nothing about this;" and, when invited to come close and look at it, he failed to do so. There was no attempt to dispute the existence of these conditions, and it must be accepted as a properly proven fact in the case that the meter had been tampered with by some one, and, as a result, it did not on the date in question measure or record the full amount of the electric current supplied to the defendant. The only question left for the jury was as to whether the defendant was the person who had unlawfully done the tampering charged. Obviously, upon this question, the accounts offered could not, under the circumstances, throw any light. Whether they became admissible in answer to some evidence that was produced by the State will now be considered. One Middleton, an electrician, testified for the State that on August 17th preceding he was working for one R., and with him was fixing a sign at defendant's place; that, when this was finished, defendant asked R. when he was "going to fix that;" that R. then sent witness for a hat pin; that witness went and bought one, and gave it to R.; that R. and defendant then went over to the electric light meter, and some one took a stepladder over, and defendant was standing at the door, and then R. said: "It is fixed now. Turn on the light," which was done, and R. then said, pointing to the 1,000 dial, "See, it don't move now;" that defendant stood on the stepladder, looked at it, and said, "It don't move;" that R. said, "I will show you how to fix this. You can work it fifteen days and burn free, and the next fifteen days you can let your bill run;" and defendant replied, "All

right." It may be said that, if the books showed that the charge for August was up to the other months, that would tend to affect the credibility of the testimony of Middleton, who was contradicted by the defendant. But there was no proof that the pin device was continued through August, nor that the number of lights used and the hours of use in August were the same as they had been in the other months with which the comparison was to be made. It is a settled rule "that the evidence offered must correspond with the allegations, and be confined to the point in issue," and that under it "all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute, should be excluded." 1 Greenl. Ev. 51, 52. And it was held in the Court of Errors that the admission or rejection of evidence of this character, though bearing remotely on the issues involved or upon the credibility of witnesses, is within the discretion of the judge, and its admission or rejection is no ground for reversal on error. *Schenck v. Griffin,* 38 N. J. Law, 462. Another witness testified to a proposition by defendant to him in the latter part of August in that year to go to New York with him to fix up an electric meter that would save electric lights from burning; that Mr. R. had taken hold of it, and that he wanted witness to take hold of it, which he (witness) refused to do. The defendant testified to having no knowledge of any tampering with the meter, and entered a denial of having made the statements attributed to him by the witnesses named. After a reading of the whole testimony we may justly adopt the language of Mr. Justice Depue in *Schenck v. Griffin, supra,* and say, "If the proof offered had any weight in deciding the issue between the parties, its effect would be so slight that the plaintiff in error cannot be said to be injured by its exclusion."

There were assignments of error upon exceptions taken to parts of the charge wherein the judge discussed, to some extent, the facts and their relative weight, but this has been so often held to be within the province of the judge that further comment is unnecessary. There was also an exception to the charge of the court, in leaving it to the jury to say whether if the defendant did the act charged, it was done without the consent of the company; defendant contending there was no evidence to justify such an inference. But we think the circumstances proven would justify such an inference by the jury.

Under the evident impression that the entire record was broug up in this case, pursuant to sections 136 and 137 of the Crimin Procedure Act (P. L. 1898, pp. 866-915), the defendant's coun has specified several causes for relief, which we are asked to co sider. But the entire record is not certified as such by the tri judge, nor is its certification required by the terms of the wr This is the established practice. *Ryan v. State,* 60 N. J. La 552, 38 Atl. 672; *State v. Shutts* (N. J. Sup.), 54 Atl. 235. V are not permitted, therefore, to notice the causes for relief r covered by exceptions taken at the trial.

The result is that the judgment below must be affirmed.

COSGROVE v. KENNEBEC LIGHT & HEAT CO.

Maine Supreme Judicial Court — March 11, 1904.

98 Me. 473, 57 Atl. 841.

NEGLIGENCE — BURNING OUT OF TRANSFORMER — EVIDENCE — CONTRIBU NEGLIGENCE. — 1. Negligence on the part of the plaintiff that is the p mate cause of the injury will preclude an action to recover damages the injury.

2. In an action by the plaintiff, a night engineer in the service of the land Manufacturing Company, to recover damages against the Kenr Light & Heat Company for injuries sustained by him as the resul bringing his right hand in contact with an electric light wire in the room of the Oakland Manufacturing Company, it appeared that the gerous condition of the electric cord was caused by the breaking dow

3. It further appeared that, two hours before the injury, Higgins, the day engineer, informed the plaintiff that there was trouble with the wires, and that he had received a shock from the button controlling the light, and warned him not to touch it; but the plaintiff contended that he was induced by the assurances of the defendant's station agent, Berry, and by the nature of Foreman Soule's telephone communication, to believe that the danger existing when Higgins received a shock from the button had been obviated, and that at the time of the accident he was following the instructions of Berry to "draw the light in where it belonged, under the apron of the boilers."

Held, on a motion to set aside a verdict for the plaintiff, that his testimony in regard to the time and substance of the conversation by telephone with Foreman Soule is so strongly discredited by the circumstances and its own inherent improbability, as well as by the great weight of positive evidence against it, that it cannot be deemed sufficient to support a finding that the plaintiff was misled or induced to relax any prudence or vigilance respecting the electric wires in the fire room by reason of his conversation over the telephone with Foreman Soule.

4. It further appeared that if the plaintiff was directed by Station Agent Berry to "tie the lamp under the apron, where he wanted it," he performed the undertaking with due regard to the warnings he had received. He attached a string to the electric cord, drew the lamp into the desired position, tied the other end of the string around the pipe, and fully completed the task without accident or injury of any kind. The conclusion was therefore deemed irresistible that after the plaintiff had finished his task of tying the lamp under the apron, and as he was about to descend from the ladder, he unnecessarily and thoughtlessly grasped the electric cord, and thereby received the shock and injury of which he complains. It was accordingly

Held, that a want of due care on the part of the plaintiff himself was the proximate cause of his injury, and that the verdict was clearly erroneous.

(Official.)

Verdict for plaintiff. Motion for new trial. *Granted.*

This was an action on the case to recover damages for injuries received by the plaintiff on the 18th day of February, 1901, by reason of his right hand being burned on an electric wire in the Oakland Manufacturing Company's shop, but supplied with electricity from the defendant company's station, and sustaining a compound fracture of the collar bone as he fell after being burned. It was claimed that these injuries were caused through the negligence of the defendant company.

The verdict was for the plaintiff in the sum of $1,555.

Before WISWELL, C. J., and WHITEHOUSE, STROUTT, SAVAGE, and POWERS, JJ.

Geo. W. Heselton, for plaintiff.

Orville D. Baker, for defendant.

Opinion by WHITEHOUSE, J.:

The plaintiff, a night engineer in the service of the Oakland Manufacturing Company of Gardiner, recovered a verdict of $1,555 against the Kennebec Light & Heat Company for injuries sustained by him as the result of bringing his right hand in contact with an electric light wire in the fire room of the Oakland Company. The case comes to this court on motion to set aside the verdict as against the evidence.

It is not in controversy that the electric lights for the engine house of the Oakland Company were furnished by the defendant company, and the wires hung in the pumproom and the fireroom substantially as required by the agents of the Oakland Company. The electric cord or wire in the fireroom, in connection with which the accident occurred, was suspended from the ceiling; and, when the cord was plumb, the light was about 5½ feet from the steam guages in front of the boilers, and 8 or 9 feet from the floor. The apron or smoke flue projected about 4½ feet over the front of the boilers. For the purpose of bringing the light nearer the steam gauges, the electric cord was drawn in from its vertical line and "triced" under this apron by the use of twine, and it had been allowed to remain in that situation until it became detached a short time before the accident. The wires for these lights came in over the boilers from the defendant's electric light station, a few rods distant. The transformer, which reduced the high voltage current, and transmitted the low voltage through these secondary lighting wires to the incandescent lamps, was also located in the electric station.

In the afternoon of February 18, 1901, the plaintiff came at the usual hour of 5 o'clock to commence his work as night engineer, relieving Mr. Higgins, the day engineer, of his duties. He testifies that Higgins then said to him: "'Robert, I wouldn't turn that button there that gives us the light in the boiler room, for I got a shock off of it there to-day. It went right up my arm, and most knocked me down on the floor.' Says he, 'I wouldn't touch that button to turn the light on or off.'" He further states that Higgins told him to inform Berry, the defendant's agent in charge of the electric station, that his transformer was burning out, and that thereupon he and Higgins went over to the station, and he saw the transformer smoking. A few minutes later, about

quarter past five, the plaintiff says he telephoned Mr. Soule, the defendant's forman in Gardiner, that Higgins asked him to tell Soule that his transformer was burning out, and that Soule replied, "All right." About 5.30 or 5.40 P. M. he says he went over to the electric station again, and told Berry that his transformer was burning out, that it was smoking on the wall then, and that the lights were "acting bad;" that Berry replied that he would come in and see to them after he got his machines going; that about an hour later Berry came into the boiler room, with rubber gloves on his hands and rubber shoes on, and went up on top of the boilers, examined the wires, cut off a wire used by the bricklayers, but not then in use, and said to him: "Your lights will go all right now. * * * I will go out and turn the current on — the lights on — and you draw that light in there where it belongs," and the plaintiff said, "All right," he would. The plaintiff then explains the accident as follows: "I immediately got the ladder — put it up to the boiler front. While I was in the act of going up the ladder, the lights came on. The boy was at the foot of the ladder with the lantern. I was in the act of tying the string around the wire of the lamp, when my right hand came in contact with the wire, and I got a shock. It made me jump, and this hand came against the boiler front, which formed a complete circuit through my body." The hand was so burned that it was necessary to amputate one of the fingers, and by falling from the ladder the plaintiff sustained a fracture of the collar bone.

Mr. Higgins, called as a witness for the plaintiff, states that, when he told the plaintiff that he received a shock from the button that afternoon, he added, "If you don't believe it, you try it;" and the language of the plaintiff's reply was, "To hell with it! I won't touch it. I don't like the stuff." In answer to the special inquiry, "What did you say to him in the way of advice as to handling or not handling the wires?" Higgins testifies: "I told him I wouldn't touch it, if I was him; gave him advice — that's all."

The plaintiff's son, Ralph C. Cosgrove, 16 years of age, who stood at the foot of the ladder at the time of the accident, gives a version of it materially different from that of the plaintiff himself. He states that his father waited on the ladder until the

electric light was turned on by Mr. Berry; that he tied one end of the string around the electric cord, drew the light in under the apron, and tied the other end of the string around a pipe in front of the boiler to hold the light where he wanted it; that, in doing this, he did not take hold of the electric cord with his hands at all; that, the next thing he saw, his father was hung on the wire, with one hand against the face of the boiler, and the other on the wire about a foot above the lamp.

The reasonable inference from this testimony that the plaintiff thoughtlessly and carelessly took hold of the electric cord with his hand, after he had completed the act of tying it under the apron, appears to be confirmed to some extent by the testimony of Dr. Giddings, also a witness for the plaintiff, who states that the tissues were burned and scarred on the inside of the thumb and across the palm of the hand.

It satisfactorily appears from all the evidence, including the subsequent investigations, that the dangerous condition of the electric cord in the fireroom was caused by the breaking down of the insulation that separates the primary and secondary wires in the transformer at the defendant's electric station, whereby the entire voltage of the primary current was enabled to pass into the secondary wire which supplied the lights in the fireroom. It is not in controversy, however, that this transformer was purchased from a reputable concern, that it was of a standard pattern and approved design, and that it had not previously shown any indications of breaking down. It is not seriously contended, therefore, on the part of the plaintiff, that any negligence or breach of duty on the part of the defendant company is established by the mere fact of the burning out of this transformer. But the plaintiff insists that, notwithstanding the warning and advice given him by Higgins at 5 o'clock that afternoon, he was induced by the assurance of Berry, after the investigation made with the rubber gloves, and by the nature of Soule's telephone message, to believe that the danger existing at the time Higgins received a shock from the button had been obviated; that at the time of the accident he was following the instructions of Berry to "draw the light in where it belonged," under the apron of the boilers; and that he was in the exercise of reasonable care in so doing when the accident happened.

But without deciding whether the testimony introduced by the

plaintiff himself, in connection with the testimony of his son Ralph C. Cosgrove, authorized the jury to find that the injury was sustained by the plaintiff while following the alleged instructions of Berry to "tie the cord under where it belonged," it is proper to consider whether, upon all the evidence in the case, the jury were warranted in finding that the plaintiff's account of his injury was a credible and reliable one, for the defendant earnestly contends that the plaintiff's version is distorted and erroneous in regard to the most material facts and circumstances connected with the accident.

With regard to the telephone message sent by the plaintiff to Mr. Soule, the defendant's foreman, it is conceded that the plaintiff telephoned to him but once that evening; and Soule testifies that he distinctly remembers that it was not at a quarter past 5 o'clock, as claimed by the plaintiff, but after supper, betwen 7 and 7.10 P. M. In this he is corroborated by Mrs. Morrison, his wife's mother, who was visiting at his house at the time. She states that supper was finished before the telephone call came. Soule states that the plaintiff telephoned him that there was "some trouble with the wires in the fireroom;" he didn't know the nature of it, but he was "getting a shock off of the button." Soule says he replied, "Be careful, Robert, and I will come right down." Mrs. Morrison says she "heard them talking about there being trouble, and heard Mr. Soule say at the close, 'Be careful, Bob.'" She distinctly recalled that part of the conversation, because she learned from Mr. Soule the same evening that Mr. Cosgrove had been hurt. Thereupon Mr. Soule says he put on his coat and started for the station, going by the way of the post office, but before arriving at the station he learned of the plaintiff's injury.

The plaintiff's story, in its most essential particulars, is also emphatically contradicted by Mr. Berry, the defendant's station agent. His testimony corroborates Mr. Soule and Mrs. Morrison as to the time when the plaintiff telephoned to Soule, and shows that he, and not Higgins, directed the message to be sent. He states that he didn't see any smoke issuing from the transformer, and was unable to discover by his examination in the fireroom that the wire was grounded at any point; that, after turning on the current again, the light *seemed to be shining fairly* well, but *not quite as brightly as usual; that he went up on the ladder* him-

self and tied the string around the electric cord, and that the plaintiff only took hold of the string and drew the cord under the apron, tying that end of the string around the pipe; that when the plaintiff drew the wire against the apron a spark was emitted, and he told the plaintiff not to touch it — to keep away from it and telephone Mr. Soule — and that when he came back again the plaintiff told him Soule was coming down; that the plaintiff in the meantime had tied the lamp over nearer the gauge, and was then holding the lamp with one hand, and wiping it with the other; and that he then told the plaintiff a second time not to touch the wire, and that, "if he took hold of it, he would never let go." A few minutes later he learned from Ralph that the plaintiff had received "an awful shock," and then reminded the boy that he heard him warn his father to let the wire alone.

With reference to the testimony of Berry, Higgins makes the important statement that seven or eight months before this suit was brought, and before there was any claim for damages on the part of the plaintiff, or any discussion in regard to the question of liability, Berry stated to him all the facts and circumstances connected with the accident in precise accordance with the version given by him in his testimony before the court. Higgins makes the further significant statement that when the plaintiff gave him an account of the accident, soon after it occurred, he did not then claim that he received the injury in consequence of following Berry's directions to tie the lamp in under the apron, or that Berry was in any other way responsible for the accident.

The plaintiff admits that Higgins told him to give notice to Berry, and not Soule, of the trouble with the electric lights. Berry made an effort to discover and remedy the difficulty, but, when he saw the electric spark flash from the contact of the wire with the apron of the boiler, he evidently did not consider the result of his effort entirely satisfactory. He accordingly decided to have notice sent to the foreman, Mr. Soule, and requested the plaintiff to give the notice by telephone. This seems reasonable and probable, and is in entire harmony with the order of events stated by Berry and Soule.

Again, when Soule was informed by the plaintiff, through the telephone, that his "transformer was burning out," it does not seem reasonable or credible that Soule's only reply was, "All

right." He knew what the burning out of a transformer indicated, and it is highly reasonable and probable that he would give some direction or some assurance of his personal attention to the matter. He says he did, and it is not disputed that he did in fact immediately start for the station. But assuming that the reply was "All right," and nothing more, it is still inconceivable that the plaintiff, with the general knowledge which he undoubtedly had, that the "burning out" of a transformer, with a shock from an electric button, must indicate a dangerous condition of the wires, could possibly have understood the words "All right" to signify anything more than that the message was understood, and the matter would receive attention.

The testimony of the plaintiff in regard to the time and substance of the conversation by telephone with Mr. Soule is thus so strongly discredited by the circumstances and its own inherent improbability, as well as by the great weight of positive evidence against it, that it cannot be deemed sufficient to support a finding that the plaintiff was misled or induced to relax any prudence or vigilance respecting the electric wires in the fireroom by reason of his conversation with Mr. Soule. Even if he did not understand that he was expressly cautioned by Soule to be "careful," the plaintiff had already been sufficiently admonished by Higgins, and by his own observation of the transformer, to impress upon him the necessity of exercising care and caution in handling the lamp and the electric cord. He admits that he was promptly informed when he came on duty that afternoon that there was trouble with the wires, and that Higgins had received a shock from the button controlling the light so severe that it "nearly knocked him down;" and his profanely emphatic reply, to the effect that he didn't like the stuff, and wouldn't touch it, shows that he appreciated the warning and realized the danger. He was a competent engineer, of good general intelligence, and had had several years of practical observation and experience in the use of electricity in that room. He must have understood that the warning of Higgins was intended to include the wire as well as the button, for, if the button was dangerous, the wire was obviously more so. He saw that Berry wore rubber gloves when he made his examination of the wires, and, according to the testimony of Berry, was repeatedly and impressively warned by him not to take hold of the wires.

Assuming, then, that the plaintiff, as he claims, was told by Berry to tie the lamp under the apron where he wanted it, it would seem that he performed the undertaking with due regard to the warnings he had received, for it clearly and distinctly appears from the testimony of the son that the plaintiff tied the string around the electric cord, drew it into the desired position, tied the other end of the string around the pipe, and fully completed the task without injury or accident of any kind. It was not until all this had been done that he looked up and saw that his father had hold of the wire with one hand, and the other hand against the boiler. The conclusion is therefore irresistible that, for some unexplained reason, after the plaintiff had finished his task, and as he was about to descend from the ladder, he unnecessarily and thoughtlessly or recklessly grasped the electric cord and thereby received the shock and the injury of which he complains.

It is accordingly the opinion of the court that a want of due care on the part of the plaintiff himself was the proximate cause of the accident, and that the verdict is clearly erroneous.

Motion sustained. Verdict set aside. New trial granted.

WALTERS v. SYRACUSE RAPID TRANSIT RAILWAY COMPANY.

New York Court of Appeals — March 14, 1904.

178 N. Y. 50, 70 N. E. 98.

INJURY FROM FALLING OF LIVE WIRE ON PERSON RIDING BICYCLE — EVIDENCE — CREDIBILITY OF WITNESSES. — A nonsuit granted in an action to recover for injuries alleged to have been sustained by the falling of a live wire on plaintiff while he was riding a bicycle, cannot be upheld upon the ground that the facts testified to by plaintiff and his witnesses were utterly incredible and in fact scientific and physical impossibilities, unless it can be shown that such testimony was absolutely false.

Appeal from a judgment of the Appellate Division in the Fourth Judicial Department affirming a judgment in favor of the defendant entered upon dismissal of the complaint by the court at the Trial Term. *Reversed.*

John H. McCrahon, for appellant.

Charles E. Spencer, for respondent.

Opinion by O'BRIEN, J.:

The plaintiff sought to recover damages for a personal injury that he claimed to have sustained in consequence of the falling upon him of a guy or stay wire, being a part of the defendant's overhead trolley system for operating its railroad. One end of the wire, which was about 120 feet long, was attached to the top of a pole, and the other end was attached to the main trolley wire. There is no dispute about the fact that this wire broke near the point where it was connected with the trolley, and at least 100 feet of it fell into the street below, a distance of about 22 feet. The plaintiff testified that he was at that moment riding on a bicycle through the street, underneath the wire, and that it fell upon him, coiled around his body, and communicated what he called a shock of electricity to him, which affected his heart and nervous system. The plaintiff's testimony was in many respects corroborated by other witnesses. The proof tended to show that the plaintiff was subjected to considerable physical suffering in consequence of the accident, but whether the injuries claimed to have been sustained were temporary or permanent does not appear from the proofs.

At the close of all of the testimony the learned trial judge granted a motion made by the defendant's counsel for a nonsuit, and to this ruling the plaintiff's counsel excepted. He also asked that the whole case made out by the evidence be submitted to the jury, which request was refused and an exception was taken. The case therefore presents the familiar question whether the plaintiff produced at the trial any evidence which he was entitled to have weighed and considered by the jury. There can, I think, be no doubt that the plaintiff's testimony, if believed, or, rather, if at all credible, tended to establish the cause of action stated in the complaint. The plaintiff has been nonsuited, and the judgment of nonsuit has been affirmed at the Appellate Division, on the sole ground that the facts to which he and his witnesses testified at the trial were uterly incredible, and in fact scientifically and physically impossible. It is upon that ground that the learned counsel for the defendant attempts to sustain the judgment in this court. The fact that the overhead wire attached to the defendant's trolley system fell at the time and *place claimed*, and came in *contact, at least to some extent, with the plaintiff's* person,

was clearly established; but it was said that a stay or guy wire, one end of which was detached from the trolley, and the other end attached to a pole, could not possibly have communicated a current of electricity to the plaintiff's body. We are not able to understand how such an occurrence could have happened, but this court is not the judge of the credibility of testimony. We have frequently had occasion, in cases of accidents upon electric railways, to try and fathom some of the unaccountable freaks of electricity. We know that there are many things concerning its action that are imperfectly understood. What it does or may do under a given state of circumstances is perhaps not yet accurately known. It may be that the plaintiff's claim that he felt a shock of electricity when the wire coiled around his body was purely imaginary; but, if he tells the truth as to what followed, and the effect which the accident had upon him, there can be no doubt that in some way and from some cause he sustained bodily injuries. What the extent of these injuries was, and whether they were real, or in some degree feigned, was a question for the jury. If the plaintiff's testimony as to the circumstances attending the injury is incredible and impossible, it is as easy to expose the falsity and to demonstrate the truth before the jury as it is before the court.

All we mean to say is that the credibility and the weight to be given to the plaintiff's testimony should have been determined by the jury. It is not a very unusual thing for this court to feel constrained to affirm judgments in such cases where large recoveries have been had upon testimony quite as incredible as that of the plaintiff in this case. Moreover, it frequently happens that cases appear and reappear in this court, after three or four trials, where the plaintiff on every trial has changed his testimony in order to meet the varying fortunes of the case upon appeal. It often happens that his testimony upon the second trial is directly contrary to his testimony on the first trial, and, when it is apparent that it was done to meet the decision on appeal, the temptation to hold that the second story was false is almost irresistible. Yet in just such cases this court has held that the changes and contradictions in the plaintiff's testimony, the motives for the same, and the truth of the last version, is a matter for the *consideration* of the jury. *Williams v. Del., L. & W. R. Co.*, 155

N. Y. 158, 49 N. E. 672. If this court is to be consistent with the position taken in that case, and in many other cases of like character, we cannot hold, as matter of law, that there was no proof in this case to sustain the plaintiff's cause of action. It often happens that science and common knowledge may be invoked for the purposes of demonstrating that a particular statement in regard to some particular accident must be absolutely false. In such cases the question is for the court. But in cases of doubt we think it is wiser and better to remit such controversies to the proper tribunal for settling facts and ascertaining where the truth lies, rather than assume the power to determine the facts ourselves. This is an old rule, and, while like all other rules, it may work hardship or injustice in a particular case, it is wiser to adhere to it. *McDonald v. Metr. St. Ry. Co.*, 167 N. Y. 66, 60 N. E. 252; *Place v. N. Y. C. & H. R. R. Co.*, 167 N. Y. 345, 60 N. E. 632; *Hoffman House v. Foote*, 172 N. Y. 350, 65 N. E. 169.

The judgment should be reversed, and a new trial granted; costs to abide the event.

BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ., concur. PARKER, C. J., absent.

Judgment reversed, etc.

DALTRY ET AL. v. MEDIA ELECTRIC LIGHT, HEAT & POWER CO.

Pennsylvania Supreme Court — March 14, 1904.

208 Pa. 403, 57 Atl. 833.

1. ELECTRIC LIGHT COMPANY — DEGREE OF CARE. — An electric light company is bound to use the very highest degree of care practicable to avoid injury to every one who may be lawfully in proximity to its wires, and liable to come, accidentally or otherwise, in contact with them.

Degree of Care Required of Electric Light Company. — See note to *Brooks v. Consolidated Gas Co. of New Jersey, ante.*

Trespassers — When May Recover for Injuries from Electric Shock. — The following cases in this volume hold that a trespasser may recover: *Lynchburg Telephone Co. v. Bokker, post; Commonwealth Electric Co. v. Melville, post. Contra, Graves v. Washington Water Power Co., post; Mayfield Water & Light Co. v. Webb's Adm'r, post; Stark v. Muskegon Traction & Lighting Co., post.*

Duty of Electric Light Company to Trespassers. — See *Mangan et al. v. Hudson Riv. Telephone Co. et al., post; Burnett v. Ft. Worth L. & P. Co.*, 117 S. W. 175.

2. SAME — OWNERSHIP OF WIRE CAUSING INJURY. — Electric companies must use care not only to keep their own wires in proper condition and repair, but also to prevent their coming in contact with other wires which, by becoming charged with and transmitting the electric current, may cause injury.

3. INJURY TO TRESPASSER. — Where an electric light company had cut off connection with a house, as ordered by the tenant, but had left a live wire running from the street to the house, and this wire hung from a pole within a few feet of the ground, the company is liable for injuries received by a child coming in contact with such wire, although the child be a trespasser upon the premises at the time of the accident.

Appeal by defendant from judgment for plaintiff. *Affirmed.*

Points presented by defendant:

"(7) If James Daltry, in the exercise of that discretion which is reasonably expected from a boy of his age, size, maturity, and capacity, should have known that if he came in contact with this wire he would be hurt, then he cannot recover, and the verdict must be for the defendant. Answer. In answer to this point, we say if you find the boy had sufficient intelligence, capacity, and understanding to know that if he came in contact with the wire he would be hurt, and did purposely, carelessly, or negligently touch it, this point is affirmed.

"(8) If James Daltry played with this wire when an ordinarily careful and prudent boy of the same age, capacity, and intelligence would have stayed away from it, then there can be no recovery in either case. Answer. This point is affirmed, if you shall find that James had sufficient intelligence, capacity, and understanding to know he would be hurt if he touched the wire."

"(10) If James Daltry was trespassing on the private property of George E. Darlington, Esq., at the time he received the electric shock, which caused his injury, he was at a place where he had no right to be, and at a place where the defendant owed him no duty, and cannot recover, and the verdict in each case must be for the defendant. Answer. We say, if you find that James was a trespasser, and was where he had no right to be, and at a place where the defendant owed him no duty, then this point is affirmed.

"(11) If James Daltry was injured while playing on the lawn of George E. Darlington, Esq., he was a trespasser there. The defendant owed him no duty, and the verdict in each case must be for the defendant. Answer. That is refused.

"(12) Under all the circumstances of the case, the defendant owed the plaintiff no duty which was violated; hence there is no legal liability, and the verdicts must be for the defendant. Answer. This is refused.

"(13) The defendant could not refuse to furnish current to the property of George E. Darlington, Esq., and could not refuse to permit Walter D. Griscom, a consumer, to connect his private wires to the main line of the defendant for the purpose of getting current to light said property; but the defendant is not liable for an injury happening from those private wires of the consumer. Answer. That is refused.

"*(14) If the wire from* which James Daltry received an electric shock

did not at the time of the injury belong to the defendant, then the defendant is under no obligation to keep it in repair, and is not liable to the plaintiffs, and the verdict must be for the defendant in both cases. Answer. This is refused.

"(15) If the wire from which James Daltry received an electric shock was furnished, bought, put up, erected, and paid for by Walter D. Griscom, a tenant on the property of George E. Darlington, then the defendant is under no obligation to keep it in repair, and is not liable to the plaintiffs for the injury complained of, and the verdict in each case must be for the defendant. Answer. That is refused."

W. Roger Fronefield, for appellant.

W. B. Bromall and *John E. McDonough,* for appellees.

Opinion by MESTREZAT, J.:

George E. Darlington, Esq., is the owner of a lot or piece of ground fronting about 100 yards on Providence avenue, in the borough of Media, Delaware county. In the center of the lot, about 150 feet from the street, stands a large dwelling used as a country house, and in the rear of it is a stable. A hedge fence separates the land from the street. Midway of this fence a driveway enters the premises, leading to the house, and thence to the stable. On either side of the driveway, at the entrance to the property, is a stone gate post, and a chain hanging between the posts is the only obstruction to entering through the gateway. There is a lawn in front of the dwelling house on which the children of the neighborhood occasionally play, and when Mr. Darlington occupied the house he permitted them to enter the premises occasionally to get apples. At the time of the accident the premises were vacant.

The defendant company furnishes light, heat, and power to consumers in the borough of Media. Its light wires extend along Providence avenue in front of the Darlington premises. This property was leased to W. D. Griscom, who, in March, 1898, had the defendant company introduce electric light into the house by running a wire from its line at the gateway across the lawn to the building. This was done at the tenant's expense. Griscom removed from and vacated the premises, and just prior to doing so he directed the defendant company to cut the current so it would not pass through the house. This was done by taking out the fuses at the transformer which rested against the side, and just beneath the eaves, of the house. The electric current was thus prevented from entering the house, but not from passing

through the wire extending from the house to the defendant's feed line at the street. After the current had been cut out, the wire broke between the house and a tree on the lawn through which it passed, and was tied to the branches of the tree. The broken end of the wire fell frequently, and "was tied up in the tree out of reach four or five times before this injury." At the time of the accident it hung from the tree 14 feet from the hedge fence and 6 feet from the carriageway. It extended to a point within 12 or 18 inches of the ground and was of sufficient length to swing to the driveway.

In the immediate vicinity of the Darlington property, the plaintiff, a boy of 10 years of age, and a number of other children of like age, resided in 1901. They were accustomed to play in the street near the gateway after school hours. The plaintiff, with another boy, a few years his senior, were thus engaged in the street in front of the Darlington premises in the afternoon of April 9, 1901. They separated to go to their homes for supper, and agreed to meet later "down at the Darlington gate to play 'hide and seek' or 'hunt the hare.'" A half hour later the two boys, with several other boys of their age, assembled inside the gate where the broken wire was suspended, and engaged in "'skinning the cat' and playing around." The plaintiff came in contact with the wire, and was severely injured. Paul Matheus, one of the boys, after testifying that they had been playing with the wire, and that it "was bare at the end," thus describes the manner in which the accident occurred:

"*Q.* What happened when James [plaintiff] came? *A.* I threw the stick and when the stick lit on the wire it kind of moved over toward me and then back again, and it flew off, and he went to grab the stick and grabbed the bare wire. He got hold of the wire and fell down."

The brother of this witness gives the same account of the accident. He testifies:

"*Q.* Tell us, as well as you recollect, what happened after Jimmy [plaintiff] got in there. When you first saw him when he got in there, what happened? *A.* Paul threw a stick, and he grabbed hold of the stick. The stick swung after it had hit the wire and caught in the wire somehow, and he went to grab for the stick and grabbed the wire, and he groaned a little and fell right back."

This action was brought to recover damages for the injuries sustained by the plaintiff, alleged to have been caused by the neg-

ligence of the defendant company. The case was submitted to the jury, and a verdict was rendered in favor of the plaintiff. The learned trial judge refused to grant a new trial for the reasons set forth in his opinion, and, judgment having been entered on the verdict, the defendant has appealed.

Electricity, when of sufficient voltage for lighting purposes, is well known by electricians and others familiar with its properties to be most dangerous, and likely to cause death to those who come in contact with its current. Those who deal with it, or supply it to the public, are therefore required to recognize this fact, and to exercise care commensurate with the danger. A party responsible for an injury by reason of a failure to observe such care is guilty of negligence. As said in *Fitzgerald v. Edison Electric Company*, 8 Am. Electl. Cas. 584, 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732: "The company, however, which uses such a dangerous agent, is bound not only to know the extent of the danger, but to use the very highest degree of care practicable to avoid injury to every one who may be lawfully in proximity to its wires, and liable to come, accidentally or otherwise, in contact with them. The defendant, in accord with the common practice of electric companies, recognized this obligation by insulating its dangerous wire." The defendant seeks to relieve itself from liability for the injuries sustained by the plaintiff substantially on the ground that the company was not the owner of the wire which occasioned the injuries, and because the plaintiff was a trespasser at the time of the accident, and therefore it owed him no duty requiring the observance of care to guard his safety. We are of opinion, however, that under the facts of this case neither of these defenses can avail the defendant company. While the expense of constructing the electric light line from the defendant's wire to the house was paid by the tenant of the premises, the work was done by the defendant company, which also cut off the current from the house before the accident. It used the line to carry its current to the house until the connection was severed, and during this time it had full control of the wire, and, as it were, operated it in furnishing electricity for the building occupied by the tenant. After the defendant company had removed the fuses from the wire at the house it nevertheless *continued to send its electric current through the wire whenever its dynamo was in operation,*

although the current was not utilized for lighting purposes. The wire carried the same deadly element or agent across the lawn after, as it did before, the current was disconnected at the house, and a like responsibility rested with the defendant company to exercise care in protecting those who might come in contact with it by accident or otherwise, and through no fault of their own. The company could have severed the wire and the current at its own fed wire at the street, and thereby have removed all danger to persons who might possibly come in contact with it on the Darlington premises. No sufficient reason is assigned why the defendant did not take this reasonable precaution to avoid a patent danger as well as to relieve itself from responsibility for a wire the ownership and control of which it disclaimed.

That the company did not construct the line at its own expense cannot relieve it from the duty to exercise care in keeping it in proper condition and repair during the period the wire carried its electric current. The ownership of the wire cannot affect the company's liability for failure to observe this duty under the facts disclosed by the evidence in this case. When charged with its electricity, the wire was in the possession and control of the company so far as concerned its duty to keep it in repair and in proper condition and position to protect those who might come in contact with it. The danger lay not in the wire, but in the "subtle fluid" sent through it by the defendant company. It was not the wire that injured the boy, but the electric current which it bore from the defendant's dynamo. The use of the wire by the defendant, and not the wire itself, caused the injury to the child. Hence it logically follows that, notwithstanding the ownership of the wire may have been in another, the defendant company must be considered as in possession of and as using it at the time of the accident, and therefore responsible for any injury resulting from the failure to inspect and keep it in proper condition and repair when charged with the company's electricity.

That the ownership of the wire is not controlling as to the liability for an injury caused by coming in contact with it is determined by the principle announced in that class of cases in which it is held that an electric railway company or an electric light company is responsible for an injury where it negligently permits its wire to come in contact with another company's telephone or tele-

graph wire which transmits the current, and thereby causes an accident. This is a sound rule, and is recognized in many jurisdictions. *Block v. Milwaukee Street Railway Co.* (Wis.), 5 Am. Electl. Cas. 293, 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. Rep. 849; *City Electric Street Railway Company v. Conery* (Ark.), 6 Am. Electl. Cas. 217, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262; *Western Union Telegraph Co. v. State* (Md.), 6 Am. Electl. Cas. 210, 33 Atl. 763, 31 L. R. A. 572, 51 Am. St. Rep. 464; *United Electric Ry. Co. v. Shelton,* 89 Tenn. 423, 14 S. W. 863. These cases hold it to be the duty of electric companies to use care not only to keep their own wires in proper condition and repair, but also to prevent their coming in contact with other wires which, by becoming charged with and transmitting the electric current, may cause an injury. When an injury results under such circumstances, the electric company is responsible, by reason of the negligent control of its wires, regardless of the ownership of the wire that transmits the current to the person who is injured. In the case at bar, the electric current was not transmitted by the company's wire coming in contact with another wire which caused the plaintiff"s injury, but it was carried on a wire connected by the company with its own feed wire for the very purpose of transmitting the curernt which by reason of the noninsulation of the wire injured the boy. With much greater reason, therefore, should the defendant company in this case, under like circumstances, be held liable for the transmission of its current through another's wire than where the electric company's current is communicated to the wire by negligent contact.

The defendant company also denies its liability because, as it alleges, the plaintiff was a trespasser at the time of the accident, and it owed him no duty which it had violated. But this position is clearly untenable. If it be conceded that the boy was technically a trespasser as against Mr. Darlington, who owned and was in possession of the premises, he was not a trespasser as against the defendant company, who had neither the possession nor the right of possession of the property. It may be admitted that the company entered the premises by permission, but it was for the specific and single purpose of furnishing light to the then tenant of the property. When he directed the cutting out of the current and the discontinuance of the light in his house, the purpose of the entry

had been accomplished, and the right of the company to be upon the property had ceased. It is not claimed that the company was on the premises or was using the wire with permission of Mr. Darlington at the time of the accident. If, therefore, it was occupying the property for any purpose whatever, it was itself a trespasser. It stood on no higher ground than the plaintiff, whose presence on the lawn was violating no right of possession which the company had to the premises. Conceding that the owner of the property owed no duty of care to either, the parties themselves, however, occupied the same relative position towards him, but an entirely different position towards each other, which required that each should exercise towards the other the care demanded by the circumstances.

Assuming then, as we must assume, that the defendant company was in possession of and using the wire for the purpose of transmitting its electric current, and that as against it the boy was not a trespasser, its duty to the children at the place and time of the accident was to exercise such care over the wire as was demanded by the great danger to which they were exposed. Having constructed the line across the lawn to the house in proximity to the carriageway, it knew that children as well as adults might frequent the way, and hence the necessity for keeping its wires in proper condition and repair to avoid danger. It must be presumed that the company also knew what the evidence disclosed as a fact that children used the lawn of the premises near the gateway and in the vicinity of the wire as well as the street in front of the premises as a playground. Such conditions existed for a sufficient length of time to warrant the inference of notice to the company. The accident occurred very near the gateway — but two steps from the driveway, and only about fourteen feet from the fence. So far as pedestrians were concerned, there was practically no obstruction to entering the driveway which was the approach to the house. It was therefore the duty of the company in transmitting its current on the premises to take reasonable precautions to prevent injury to persons who might be at this point. Whether it observed this duty or not was clearly for the jury. Under all the facts of the case, we are of opinion that it was the duty of the defendant company to properly inspect and keep in repair the electric wire that carried its current across to Mr. Darlington's premises, and

that for an injury resulting from a failure to perform this duty, the company is legally responsible.

We are not convinced that the assignments raising the other questions in the case are of sufficient merit to warrant reversal. Some of those questions are considered and properly disposed of in the opinion of the learned trial judge in overruling the motion for a new trial. The use of the wire by the company for the transmission of its current was sufficient to warrant the averment in the statement that "it negligently conducted its said business and operated and controlled its wires." Several months prior to the accident, the tenant had removed from the premises, leaving the wire suspended between the street and the house as the company had constructed it. So far as the evidence disclosed, he had at no time exercised any acts of ownership over it. From the time of the construction of the line till the accident, the defendant company was the only party that made any use of the wire. It may, therefore, as laid in the statement, fairly be regarded as the company's wire.

There was some evidence of the diminished earning power of the boy, and it had to go to the jury on the question of damages. We also think that the jury would understand from all the language used by the trial judge on the subject in the charge and in answer to points that the test of the boy's responsibility for negligence was the discretion usually exercised by children of his age, maturity, and capacity. If he exercised such discretion, he is not chargeable with negligence. There is some ground for the allegation of inadequacy of the charge as recognized by the trial judge himself, but, as a whole, we are not prepared to say that the charge did not give the jury instructions sufficient to enable it to apply the correct rule in ascertaining the damages and in determining the negligence of the defendant.

The judgment is affirmed.

DAVENPORT GAS AND ELECTRIC CO. v. CITY OF DAVENPORT ET AL.

CITY OF DAVENPORT v. DAVENPORT GAS AND ELECTRIC CO. ET AL.

Iowa Supreme Court — March 15, 1904.

124 Iowa 22, 98 N. W. 892.

1. ORDINANCES — CONSTRUCTION. — A provision in an ordinance, relating solely to the method of fixing the price of electric light, does not render other provisions of the ordinance void.
2. SAME. — Power given to a city to provide light for its streets, necessarily implies the power to purchase the light of others, and to enter into a contract for such service.
3. SAME — POWER TO CONTRACT FOR LIGHTS. — Statutes construed and held that, where the law expressly grants the power to a city to contract for electric lights for a period of twenty-five years, a contract for such period is valid.
4. SAME — CONSTRUCTION OF ORDINANCE AS TO MAINTENANCE OF ELECTRIC LIGHT PLANT. — City ordinance, granting a franchise to an electric company for twenty-five years, provided that at the commencement of each five-year period the city might require the machinery and appurtenances to be in good condition, and the electric company agreed to give the city the advantages of all improvements in the production of electricity. It was held that it was very improbable that either the city or the electric company contemplated that demands might be made at the beginning of each five-year period which would require an entire change of machinery and appurtenances.

On the 6th day of February, 1896, the defendant city of Davenport passed an ordinance authorizing the plaintiff "to erect and maintain a gas, electric light, and steam-heating plant within said city, and to enter upon and occupy the streets, avenues, alleys, and public grounds" thereof "with its pipes, mains, conduits, poles, posts, wires, and other appliances" for the period of twenty-five years after June 1, 1896. The ordinance provided for the immediate construction of such a plant, and that the plaintiff could purchase or use other similar plants then or thereafter erected in the city, but provided that any plant so purchased should be put in first-class condition, and that, if the one then in the city was purchased, certain extensions and improvements were to be made, and a forfeit paid if they were not made. The ordinance required the plant to be built and equipped according to certain specifications. It required the dynamos to be of the best direct current type, and that the company should furnish and operate 400 or more arc lamps of the latest and

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Ordinances — Construction of. — *Heidt v. Southern Telephone & Telegraph Co., post* (governing crossing of telephone and electric light wires); *New Omaha-Houston Electric L. Co. v. Anderson, post* (governing electric light companies); *Cook v. North Bergen Tp. et al., post* (requiring permit and deposit before excavating in streets). See also *Knowlton v. Des Moines Edison Light Co.*, 8 Am. Electl. Cas. 800, and note thereunder (ordinance *requiring use of* waterproof insulation).

best type, single carbon, high tension direct current, and of 2,000 candle power, for lighting streets. Section 3 of the ordinance was as follows: "Said company hereby agrees to furnish said city with all lights for its streets and public buildings, being all arc, incandescent lights and gas used, for and during the term for which this franchise is granted, and said city shall take all light used by said city, not less than 400 arc, from said company during said term, except as provided for by existing ordinances upon the terms and conditions following, to wit." The price for lighting the streets was fixed for the first five years, and substantially the following provision made for the price thereafter: The price of such street lights to be adjusted each successive five years, and upon failure of the plaintiff and city to agree upon the price at the end of any five-year period, then the price should be the average price paid for similar lights by six cities in Iowa or Illinois of substantially the same population as Davenport, each party selecting three of said cities, or at the option of the city the price should be fixed by arbitration, with the agreed condition that the price should never be chargeable greater than seventy-five dollars for moonlight schedule; the ordinance contained the following provisions also: "That the city reserves the right to inspect and pass upon the machinery and appurtenances used to furnish gas, electricity, or steam, and at the commencement of each period of five years shall require that all such machinery and appurtenances are in good condition and of such approved designs as shall efficiently and properly produce gas and electric light of the required standard and power and give the city and the citizens thereof the advantages of all improvements in the production of gas and electricity. In the event of said company violating or failing to conform substantially to any of the conditions and requirements contained in this ordinance, after receiving notice and reasonable time therefor, then it shall, at the option of said city, forfeit to the city of Davenport all the rights and franchises acquired under this ordinance or pay the damages herein fixed or a reasonable penalty to be fixed by the city." The plaintiff purchased the plant then being operated in the city, and thereafter in January, 1898, the city gave it the written notice of which the following is a part: "You are hereby notified that you shall within four months from the date of the service of this notice increase your present steam boiler plant by adding thereto approximately 300 horse power. Second. Repair the foundation of the 450 H. P. Allis-Corliss engine and strengthen the main line of counter shafting in your engine department; add to the dynamo department four 125 light high tension arc machines to operate street lights. And have 250 K. W. capacity dynamo for commercial power service. Construct and place a new switch board built according to proper rules with regulating and controlling devices thereon, proper and sufficient for the purpose intended; and this you shall in no wise omit to do within such time under a penalty of the forfeiture of all rights and privileges granted under the ordinance under which you are operating said electric light plant. You are hereby further notified that you shall, on or before six months from the date of the service of this notice, adjust all street lamps to operate at approximately fifty volts for each lamp. That you repair or replace about 150 old lamps." The plaintiff furnished the city the required light, for which it *was paid according* to the terms of the agreement *until May, 1901. The city then notified* the company that *no adjustment of the price for lights for the five-year* period

beginning June 1, 1901, would be considered or arbitrated except upon the following conditions: "(a) Put all poles, cross-arms, pins, insulation, and other appurtenances on the system of wiring for street lights in first-class condition; all live wires with defective insulation to be replaced with new wire, and each lamp suspension to be provided with special insulation and cross-arm or spreader. (b) The substitution of modern high efficiency, sixty-cycle, alternating current electric generators and a system of series alternating current inclosed arc lamps in place of the company's constant current generators and open arc lamps; all to the complete satisfaction of the city." To this demand the company replied that its system was in first-class condition, but, if the city would point out the alleged defects, it would remedy them at once; that the ordinance did not contemplate a change of the system of lighting; and refused to make the change. It also offered to fix the price for lights for the next five years as provided by the ordinance. Following the demand for a change of system, the city employed an expert electrician, who made a test of the merits of the various lights upon the defendant's streets, and reported, recommending the use of the inclosed arc lamp of the direct current type. The tests were made under the supervision of the committee on public lights, and thereafter said committee made the plaintiff a proposition for the use of direct current inclosed arc lamps at a price named for the next four years. The plaintiff made a counter proposition, agreeing to put in the inclosed arc lamps, provided a certain price was paid for the lighting. Thereafter the city council passed a resolution declaring the contract with the plaintiff null and void, and still later the plaintiff offered to accept the proposition made by the committee without qualification. This offer was refused, and on the 2d of November, 1901, this action was brought to restrain the defendant from proceeding under the resolution, and to compel it to arbitrate the price of lights for the five-year period. The defendant, in a cross-petition, alleged that the plaintiff had forfeited all of its rights under the ordinance, because it had failed to comply with its requirements for gas and steam mains, for the insulation of its wires, for replacing and keeping clean the globes, and for refusing to furnish an alternating current inclosed are light system. The defendant also pleaded that the ordinance was *ultra vires*. After the trial was commenced, the plaintiff amended, alleging that, should the court find the provision of the ordinance relating to fixing the price of lights void, then it was entitled to a decree requiring the city to fix the rate for the five-year period. There was a decree for the plaintiff.

The defendant appeals. *Affirmed.*

Henry Thuenen, Jr., and *L. M. Fisher*, for appellants.

Lane & Waterman and *E. M. Sharon*, for appellee.

Opinion by SHERWIN, J.:

The trial court found, and it is conceded by the appellee here, that the provision of the ordinance for fixing the price of lights after the 1st of June, 1901, in case of a disagreement between the parties, was void. But the city was ordered to fix a fair and

reasonable price for the service for the five-year period following that date. At the time the amendment asking this order was filed, no demand therefor had been made upon the city, as required by section 4346 of the Code, but the city had long before that passed a resolution annulling the contract, and declaring that it would not thereafter pay for any lights furnished it thereunder. The city had also answered in this case, justifying its position, and insisting upon a decree sustaining its action in annulling the contract. It had not, however, until the filing of its last amendment, made any claim that the ordinance was *ultra vires,* or that the arbitration clause thereof was void. There was, then, no reason before this time why the plaintiff should ask an order compelling the city to fix the rates; and when it became necessary by reason of the change in the issues no demand was required because of the previous action and attitude of the city. The plaintiff and the court were justified in believing that the city was sincere in the matter, and, if it was, it would have been an idle thing to make a formal demand for an adjustment of the price by arbitration, particularly in view of the fact that the plaintiff had already accepted the rates and terms proposed by the city. 19 Am. & Eng. Enc. of Law (2d ed.) 761, and cases cited. Because this provision of the ordinance was void, it does not follow that no part of it can be sustained. It related solely to the method of fixing the price of the light, and did not inhere in the contract for the supply thereof so inseparably as to render an otherwise valid contract void. *Cedar Rapids Water Co. v. Cedar Rapids* (Iowa), 91 N. W. 1081; *Illinois Trust & Sav. Bank v. The City of Arkansas City,* 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518.

The principal contention relates to the power of the city to make an exclusive contract for lights for the period of twenty-five years. The right given the plaintiff to use the public ways of the city for its poles, wires, mains, and other appurtenances was not exclusive, and therefore no question as to the power of the city to grant an exclusive franchise for the use of such way is before us. The city of Davenport has a special charter, which gives it the power to provide for lighting its streets, and the statutes in force at the time the contract was made gave all cities, including those with special charters, the same power. It is a familiar rule that municipal corporations have all of the power necessarily implied from the

powers expressly given to them, and, the power being given to provide light for its streets, necessarily implied the power to purchase the light of others, and to enter into a contract for such service. *Levis v. City of Newton* (C. C.), 75 Fed. 884. So far, then, as the naked power to contract for lights is concerned, it makes no difference whether it be implied or expressly given by statute. It is contended, however, by the appellee, that such power was not only given by the statute, but that the statute went further, and gave the city the express power to contract for lights for twenty-five years. Chapter 78, p. 80, of the Acts of the Fourteenth General Assembly, authorized all cities, towns, and villages to construct, maintain, and operate waterworks "for the purpose of supplying pure water to such corporations and the citizens thereof, for domestic and manufacturing purposes." It was also provided, "Or they may in their discretion authorize the construction, maintenance and operation of such works by individuals or corporations, on such terms as may be agreed upon." The act also authorized the municipality or persons or corporations constructing such works to go beyond the corporate limits for the purpose of procuring a supply of pure water, and gave the municipality jurisdiction over the territory so used, and over the stream or source of water supply, for five miles above the point from which the water was taken. The cities, towns, or villages were also given the power to "condemn and appropriate so much private property as shall be necessary for the construction and operation of said waterworks." The purpose of the provisions of this act, to which we have already referred, was, without doubt, to enable cities and towns to secure water service for corporate and private use; and, if no further provision had been made therein, it is evident that the express power granted would by necessary implication have carried with it the power to contract for water for municipal purposes, otherwise one of the clearly expressed objects of the act would have been defeated. But the act contained another clause, which was as follows:

"Sec. 5. That whenever the right to build, maintain, and operate such works is granted to or conferred upon private individuals or incorporated companies by said cities, towns, and villages, they may make such grant to inure for a term of not more than twenty-five years, and authorize such individual or company, so constructing such works, to charge and collect from *each and every person* supplied by them with water, such water rent or rents

as may be agreed upon between said person or corporation so building said works, and said city, town, or village granting such right; and such cities, incorporated towns, and villages are hereby authorized and empowered to enter into a contract, with said individual or company constructing said works, to supply said city, town, or village with water for fire purposes, and for such other purposes as may be necessary for the health and safety of such municipal corporations, and to pay therefor such sum or sums as may be agreed upon between said contracting parties."

This expressly authorized the grant of the franchise for a period of twenty-five years, and expressly authorized the municipalities to contract with the person or corporation to whom it was granted for their own water supply. If nothing further was intended by this latter provision than to confer the power to contract without reference to time, it was unnecessary, because of the power to be implied from the other express provisions of the act. Individuals or corporations might be authorized to construct such works "on such terms" as were agreed upon, and the grant to them might be for a term of not more than twenty-five years. The act applied to all cities and towns regardless of population. In very many, if not in a majority, of them, the grant of a franchise followed by its use, while not exclusive in terms, would be so in fact, because of the expense of the plant and the limited demand for water. Small cities and towns were unwilling then, as they are now, to incur the expense of installing and operating a plant of this kind. But if they could give the right to do so to individuals or corporations, on such terms as they could agree upon, and thereby secure water for fire protection, and for such other purposes as were necessary, during the life of the franchise, they would acquire valuable rights without incurring the responsibility, financial and otherwise, of owning and operating such plants. We reach the conclusion that it was the legislative intent that contracts for the supply of water might be made covering the whole life of the franchise. And such was the holding, in effect in *Grant v. The City of Davenport,* 36 Iowa, 396. We do not mean by this, however, that power was given to fix the rate to be paid for such entire period. We have discussed this act because it was substantially carried into the Code of 1873 as sections 471 to 479, inclusive, and the latter section made all of the provisions and powers conferred by said *section applicable* to cities acting *under special charters.*

But so far we have been dealing with waterworks only, and now consider the applicability of the law to the question before us. The Twenty-Second General Assembly, by chapter 11, p. 16, of its Acts, amended the Code of 1873 as follows:

"Sec. 1. That section 471, Code of 1873, be and the same is hereby amended by inserting in the first line thereof after the word 'works' the following words: 'or to establish and maintain gas works or electric light plants with all the necessary poles, wires, burners, and other requisites of said gas works or electric light plants.'

"Sec. 2. That sections 472, 473, 474, and 475 of the Code of 1873, shall be held to apply to the establishment and maintenance of gas works and electric light plants as fully as they do to the erection of waterworks."

That this amendment was intended to and did give municipalities the power to erect or cause to be erected gas works or electric light plants, we do not doubt. Nor do we doubt that it conferred upon them the power to deal with persons or corporations constructing such plants, precisely as they were authorized to deal with the owners of waterworks. In fact, it seems to us that the express provision that sections 472 to 475, inclusive, "shall be held to apply to the establishment and maintenance" of such plants "as fully as they do to the erection of waterworks," so clearly indicates this purpose that any other construction thereof would do extreme violence to its language. Nor can any other construction be placed thereon without so limiting the power of cities and towns over the construction and control of such plants as to virtually nullify the entire act, and this would be contrary to every rule of construction. We hold that the law in force when the contract was made expressly granted the power to contract for lights for a period of twenty-five years, and that, where such power is given, a contract for their supply for such period is valid. *Des Moines v. Water Works Co.*, 95 Iowa, 348, 64 N. W. 269; *Creston Water Works Co. v. City of Creston*, 101 Iowa, 687, 70 N. W. 739; *Grant v. City of Davenport, supra; Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; *Freeport Water Co. v. Freeport*, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679; *Danville v. Danville Water Co.*, 178 Ill. 299, 63 N. E. 118, 69 Am. St. Rep. 304; *Atlantic City Water Works Co. v. Atlantic City* (N. J.), 6 Atl. 34. We do not understand that the appellant seriously questions the validity of such a contract where the power to make it is expressly

given, or when such power must necessarily be implied. We have examined the authorities relied upon by the appellant to maintain its contention that a city may not enter into an exclusive contract for a long period of time, and find the decisions based upon the want of power either express or implied, and shall not take space to review them. It requires no argument or citation of authorities to sustain the proposition that, if the city had the power to make the contract for its supply of water, it would not be void because of exclusiveness, for all contracts for service of this kind must, in their very nature, be exclusive. The right to forfeit the franchise was insisted upon because of the defective condition of the plant, gas mains, electric light wires, and because of the refusal to substitute the alternating system for the one then in use. As to the first of these complaints, we need only say that a careful reading of the evidence has satisfied us that there is no merit in it. It may be and probably is true that there were cases of imperfect insulation of the wires, and of broken or dirty globes; and these defects are incident to the operation of such plants, and seem to have been remedied whenever attention was called to the specific defect. Moreover, the ordinance provides for an action to compel the plaintiff to comply with these requirements, and the court would not be justified in declaring a forfeiture of the franchise which would inevitably greatly depreciate the value of the plaintiff's property without the most cogent reasons for so doing. The trial court found as a matter of fact that the alternating current inclosed arc lamp did not furnish as satisfactory light as the direct open arc lamp, and this finding we think was fully warranted by the great weight of the evidence, and we reach the same conclusion. By the terms of the ordinance the plaintiff agreed to give the city the "advantages of all improvements in the production of gas and electricity," and it is certain that, if the proposed change would not be an improvement over the old system, it could not be required.

But, in addition to the finding of fact, which would alone determine the question in favor of plaintiff, we do not believe the ordinance contemplated such a change as was demanded. It will be remembered that the plaintff installed a plant complying with the specification of the ordinance, and put in a large amount of new machinery at great expense, which the evidence shows would

be rendered useless by the installation of the alternating system. The ordinance provides that at the commencement of each five-year period the city may require "that all such machinery and appurtenances are in good condition and of such approved design as shall efficiently and properly produce gas and electric light of the required standard and power, and give the city and the citizens thereof the advantages of all improvements in the production of gas and electricity." The machinery and appurtenances supplied under the required direction of the city were to be inspected, and required to be in good condition, and of such design as to furnish light of the "standard and power" already designated, so that the city should have the advantage of all the improvements calculated to increase the efficiency of the system then in use. This construction is warranted from a consideration of the entire ordinance and in view of the fact that it is very improbabable that either the city or the plaintiff contemplated that demands might be made at the beginning of each five-year period which would require an entire change of machinery and appurtenances, no matter how great the expense.

The decree below was in all respects right, and it is affirmed.

EMERY v. CITY OF PHILADELPHIA.

Pennsylvania Supreme Court — March 28, 1904.

208 Pa. 492, 57 Atl. 977.

1. ELECTRIC WIRE IN STREET — DEGREE OF CARE. — A city using electric wires, as a part of its police system, is bound to the very highest degree of care practicable to avoid injury to every one who may be lawfully in proximity to the wires, and liable to come, accidentally or otherwise in contact with them.
2. SAME — LIABILITY OF CITY. — A city is liable for injuries resulting from leaving a heavily charged and exposed electric wire on any part of a public highway, or so near it that a traveler accidentally or intentionally deviating a few feet from the beaten track may encounter it to the risk of life.

Defendant appeals from judgment for plaintiff. *Affirmed.*

Liability of City for Negligence in Maintaining Electric Light Plant. — See note to *Davoust v. City of Alameda, post.*

At the trial it appeared that on March 10, 1902, Harry Emery, husband of plaintiff, was found dead on the east side of the Welsh road, a public highway in Philadelphia, between Bustleton and Holmesburg. Death was due to an electric shock from contact with a broken fire-alarm wire lying at the side of the road. The road in question was forty-five feet wide, and sixteen feet of the road had been macadamized by the city.

The defendant presented the following points:

"(1) Under all the evidence in this case your verdict must be for the defendant. Answer. That point I refuse.

"(2) The city of Philadelphia is vested with discretion in the selection of the character and extent of the improvements to be made in the public highways within its boundaries. If the authorities so desire, public roads may be maintained without paving of any kind, so long as they are reasonably safe for travel. And if the highway be opened to a width of forty-five feet, more or less, in a rural district, the authorities may designate what portion of it shall be used by travelers thereon; in other words, they have the power to limit the use of the highway in such districts to the wrought way of the road, and thus limit the responsibility of the municipality for injuries sustained thereon by a person intentionally departing therefrom without reasonable necessity. Answer. I decline so to charge.

"(3) Where a person voluntarily leaves the part of the road which the public authorities have clearly marked out for travel, and in consequence is injured, the municipality is not liable, although the accident be due to a defect or obstruction existing within the road as laid out, but not upon or within the wrought way. If you should find, therefore, the plaintiff's decedent alighted from his wagon and went upon the ground not designed or intended for public travel, and while there said decedent was killed in consequence of coming in contact with a wire charged with electricity, the plaintiff is not entitled to recover damages in this case, and your verdict must be for the defendant. Answer. I decline that point.

"(4) If you find the plaintiff's decedent voluntarily left the wrought way, and went upon ground not intended for public travel, and while there met his death in consequence of coming in contact with a wire charged with electricity, your verdict must be for the defendant, even though you find that the ground upon which he was killed was within the lines of the Welsh road. Answer. I decline that point.

"(5) It may be assumed that on the morning of March 10, 1902, the wrought way of the Welsh road was reasonably safe for public travel, and that, if plaintiff's decedent had kept upon it, no injury could or would have been sustained by him in consequence of the fire-alarm wire falling from its position on the pole. The accident was due to the fact that said decedent entered upon that part of the road which the city had no reason to anticipate he would use. And, even though you should find that said decedent's hat blew off, and that the accident to him resulted from an attempt to secure it, the city was not bound to anticipate such an occurrence, and to provide against it, any more than it would be its duty to foresee that by some sudden emergency, not due to a defect in the road, a pedestrian, while traversing the same, might be impelled, in an attempt to avoid injury, to go upon the side of the road. The immediate and producing cause of the injury therefore was the action of plaintiff's decedent in leaving the wrought way of the road, and

not the fire-alarm wire at side of road. The city not being responsible for the action of plaintiff's decedent in leaving the road, your verdict must be for the defendant. Answer. I refuse that point.

"(6) The testimony in this case will not warrant the inference that plaintiff's decedent left the wrought way of the road for the purpose of entering the field adjoining the road, or for the purpose of securing his hat, or for any other purpose, which would make the city liable for his death in consequence of coming in contact with the fire-alarm wire, and your verdict therefore should be for the defendant. Answer. That I decline.

"(7) The wire which caused Emery's death having been under the management, control, and supervision of the electrical bureau, and used exclusively for fire-alarm purposes, the city is not responsible for any accidents due exclusively to the careless supervision of said wire by the officials of said bureau. If you find, therefore, that Emery's death was due to the negligence of the officials of said bureau, or to the combined negligence of said officials and the said Emery, the plaintiff is not entitled to recover, and your verdict must be for the defendant. Answer. That I decline.

"(8) In determining the question of the negligence of the city in caring for the highway, you are to take into consideration that the accident occurred on a country road in a sparsely populated district; that the traveled portion of the road was macadamized for a width of sixteen feet; that the ground on the east side of the road between the macadam and the fence was unfit for travel; that the wire was located a number of feet from the improved portion of the road; that the grass in proximity of the wire was charred and blackened; that it could be readily seen by day, and that a red light was placed near it by night. Answer. That I decline to charge because it assumes as facts conclusions which must be left to the jury to be drawn from the proofs, and because it is not in all of its averments of fact testified to."

Before MITCHELL, C. J., and DEAN, FELL, BROWN, MESTREZAT, POTTER, and THOMPSON, JJ.

John L. Kinsey, City Solicitor, and *J. W. Catharine,* Assistant City Solicitor, for appellant.

Fred. Taylor Pusey and *C. J. Hepburn,* for appellee.

Opinion by MITCHELL, J.:

The stress of the appellant's argument is in the contention that the city is not bound to keep its rural highways in safe travelable condition for their full legal width, and, as the body of the deceased was found outside of the "wrought portion" of the Welsh road, he must be assumed to have gone there at his own risk. The first six and the eighth assignments of error are based on this argument. But the learned judge could not have charged the jury on this view, as it assumed facts which were not conceded. By the "wrought portion" of the road appellant means a space

of sixteen feet in width in the middle of the road, which was laid with what appears to have been an unusually good macadam pavement. But it was in evidence that on each side of this paved strip was a smooth surface of sod or earth at the same level, but inclining gradually to the sides, and apparently intended for the same use; in fact, what is commonly known in this part of the country as a "summer road," used by many travelers in good weather in preference to the macadamized stone. Moreover, it is not conceded that the locality was clearly rural, and the road at that point a mere improved country road. All of these matters were proper for the consideration of the jury in the whole case, and could not have been safely assumed by the court as admitted or proved beyond controversy.

But, even if the facts had been conceded to be as appellant claims, the exemption from liability outside of the wrought portion of the road could not be carried to the extent appellant contends for. It is true that in some of the very numerous cases on the subject it is said that as to country roads the township or other municipality does its duty if it keeps a reasonable portion of the road in safe and convenient condition for travel, and that this rule applies in certain circumstances to roads which have become city streets, and that, as a corollary, a traveler who voluntarily leaves the safe portion of the road assumes the risks of so doing. But all these expressions must be read in connection with the special facts under consideration at the time. In *Monongahela City v. Fischer,* 111 Pa. 9, 2 Atl. 87, 56 Am. Rep. 241, the traveler crossed the highway diagonally at night for the purpose of taking a footpath over adjoining land, missed the path, and fell over the outer wall of a culvert. The principal question in the case was the instruction of the trial judge on the subject of contributory negligence. This case — which is the strongest on that side of the question — it is said in *Corbalis v. Newberry Township,* 132 Pa. 9, 19 Atl. 44, 19 Am. St. Rep. 588, "was a very close one, * * * and depended largely on its own facts, none of which were disputed." See, also, *Scranton v. Hill,* 102 Pa. 378, 48 Am. Rep. 211; *Merriman v. Phillipsburg Borough,* 158 Pa. 78, 28 Atl. 122, and *Wall v. Pittsburg,* 205 Pa. 45, 54 Atl. 497, all of them likewise cases of *injury occurring* at night, where the *traveler, to that extent, voluntarily encountered*

unknown risks. But none of these cases give any support to th contention that the city, or even a borough or township, may, wit impunity, leave a highly dangerous and insidious obstruction, suc as a heavily charged and exposed electric wire, on any part of public highway, or so near it that a traveler accidentally or in tentionally deviating a few feet from the beaten track may encou ter it to the risk of life. On the contrary, it has been uniforml held that those using this new and dangerous agent are boun to the very highest degree of care practicable to avoid injury t every one who may be lawfully in proximity to the wires, an liable to come, accidentally or otherwise, in contact with ther *Fitzgerald v. Edison Electric Illuminating Co.,* 8 Am. Electl. Ca 584, 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732. The fa that the wires are owned or used by the city as part of its poli instruments does not alter the rule, or exempt the city from li bility under it. *Mooney v. Luzerne Borough,* 7 Am. Electl. Ca 505, 186 Pa. 161, 40 Atl. 311, 40 L. R. A. 811; *Herron v. Pit burg,* 8 Am. Electl Cas. 482, 204 Pa. 509, 54 Atl. 311, 93 A St. Rep. 798.

The only remaining question relates to the admission of t Carlisle Mortality Tables as evidence of the expectation of l of plaintiff's husband. Those tables have been held admissil and that question is not now open. *Steinbrunner v. Pittsbu etc., Ry. Co.,* 146 Pa. 504, 23 Atl. 239, 28 Am. St. Rep. 8(*Campbell v. York,* 172 Pa. 205, 33 Atl. 879; *Kerrigan v. Pen R. R. Co.,* 194 Pa. 98, 44 Atl. 1069. They are not conclusi

the simple admission of the Carlisle Tables, but on their admission as evidence of the expectation of life of plaintiff's husband, without accompanying proof of plaintiff's own age and expectation. It is argued that, while the husband might have lived a certain number of years, yet the wife might not, and therefore her damages ought to be limited by the double contingency of their joint lives. The point is new, and the fact that it has not been raised before in any of the very numerous cases where it would have been appropriate, if sound, would seem to indicate that it has not appeared tenable to the professional mind. We are of this opinion. The life of the husband having been terminated by the accident, its probable duration in the regular course of nature must, as already said, be approximated by the best evidence attainable, even though that leads only to conjecture. But the widow, plaintiff, is living, and is entitled now to compensation for what she has lost by her husband's death. To complicate the question by another conjecture as to her expectation of survivorship would add further uncertainty in the result, without being so clearly demanded by reason or justice as to be imperative, or even advisable. Appellant cites *Baltimore, etc., Turnpike Road v. State*, 71 Md. 573, 18 Atl. 884, which seems to give the approval of a court of very high authority to this contention. It appears, however, that under the Maryland Code action in such cases is brought by the State to the use of the widow and infant children, and the jury are to give "such damages as they may think proportioned to the injury resulting from such death to the parties respectively." It is not clear that this means more than that the jury, instead of giving a lump sum to all, shall apportion their verdict among the various parties plaintiff. If such be the meaning, the inquiry as to the widow's expectation of life would be relevant and material. But under our statute, the widow, without regard to her age or expectation of life, takes such proportion of the damages as she would have taken in her husband's personal estate in case of intestacy. Hers is a present right, regardless of age. Whatever, however, may be the extent of the decision in the case cited, we do not think it should prevail against the general trend of the authorities, and especially the significant silence of our own cases in such a *prolific field of litigation* as deaths from *negligence*.

Judgment affirmed.

BUCKLEY *v.* WESTCHESTER LIGHTING CO.

New York Appellate Division, Second Department — April 15, 1904.

93 App. Div. 436, 87 N. Y. Supp. 763.

DEATH FROM CONTACT WITH BROKEN ELECTRIC LIGHT WIRE — INSTRUCTION — CONTRIBUTORY NEGLIGENCE. — In an action against an electric ligh company to recover damages resulting from the death of the plaintiff intestate, who was killed by coming in contact with one of the defen ant's electric light wires, it appeared that some time prior to the accide the wire in question was discovered lying on the ground quite close to boiler house in which the intestate was employed; that the person wh discovered the wire removed it some distance away from the only e trance to the boiler house and that the intestate who was aware of th deadly character of the wire, placed boards on and around the wire so to fence it in; that the defendant sent two linemen to repair the wir and that upon their arrival one of them took the end of the wire ne the boiler house and began to splice it. The intestate returned to t boiler house but whether he did so before or after the work of repa had been commenced was disputed. During the progress of the repai the intestate stepped out of the boiler house backwards and came contact with the wire and was killed. The witnesses estimated the tim during which the intestate was in the boiler house from five to twen minutes. It was held that the question of the defendant's liability w one of fact for the jury.

That it was not error for the court, in answer to a request of t plaintiff's counsel to charge that "the deceased was lawfully in the boi house, and was not obliged to apprehend danger from a live wire on t ground immediately at the entrance of the boiler house, if it was there when he entered the house," to reply, "I will leave all these qu tions to the jury. It is a question of fact."

That it was not objectionable for the court to charge that "whate

Before HIRSCHBERG, P. J., and BARTLETT, JENKS, WOODWARD, and HOOKER, JJ.

Jacob Marks, for appellant.

Frank Verner Johnson (*E. Clyde Sherwood*, on the brief), for respondent.

Opinon by JENKS, J.:

The plaintiff charges an electric lighting company with negligence, in that it permitted its wire to be and to remain out of repair and broken, and yet alive, whereby plaintiff's intestate, then upon a public street, came into contact with the wire and was killed. The jury found that "both parties were negligent, and for the defendant."

The intestate was an engineer of a boiler in a building on North street, New Rochelle. In the daytime Mr. Stroebel, a lineman of the New York Telephone Company, saw the wire lying on the ground and spluttering fire. It was then quite close to the boiler house. Mr. Stroebel lifted the wire by tape insulation, and placed it close to a pole, and in the rear of the boiler house, some distance away from its only entrance. Then the intestate placed boards on and around it, so as to fence it in. The defendant had been notified of the break, and sent in haste two linemen to repair the wire. Upon their arrival, one of them, Mr. Pfeiffer, took the wire back to the sidewalk, and they there began the work of repair; which was a process of splicing. The wires being repaired were then in the vicinity of the door of the boiler house. The intestate, during this work of repair, stepped out of the boiler house, and fell dead. In all probability he came into contact with a live wire. No other cause of his death is suggested, and the attendant circumstances point to death from an electric shock from the wire or wires, which were then charged with lethal current.

There was dispute whether the intestate went into the boiler house before repairs were begun. Mr. Stroebel, for the plaintiff, testifies that the intestate did enter it before that time, and remained there until he stepped out to his death. But the two linemen testify, for the defendant, that the intestate was present when they began their work (and one also says when they laid it out), and that Mr. Pfeiffer then told *him that there was enough current in the wire to kill six men. But, so far as this bears* upon

the dangerous character of the wire, even Mr. Stroebel testifies that Mr. Pfeiffer warned the intestate of its deadly character, but that the intestate was in the boiler house at that time. In any event, the evidence that the intestate knew of the dangerous character of the wire before the arrival of the repairers is overwhelming. The plaintiff's witness, Mr. Stroebel, testifies that the intestate came out of the boiler house backwards. The witnesses vary from five to twenty minutes in estimating the time during which the intestate was in the boiler house. I think that the case was properly for the jury, and that no reason appears from the facts for disturbing its verdict.

The learned counsel for the appellant insists that the learned court erred in several rulings which are fatal to the judgment. At the close of the main charge, the court was asked by the plaintiff to charge:

> "That Golden had the right to assume that while he was inside the boiler house, engaged in the performance of his duties, the defendant's employees would not place a live wire near the entrance of that house, where it would become dangerous to him."

The court replied:

> "Yes. I will not touch that any more than I have."

The appellant says that the court refused to charge the request. I think otherwise. It answered "Yes," thereby in effect so charging the jury. I cannot construe the entire response of the court: "Yes. I will not touch that any more than I have" — save as a statement by the court that it would charge, and that it did

the electric pole, and there turned off the current altogether, and that, as he was mending and dealing with a thing the deadliness of which is admitted by everybody, ordinary care should have compelled him to have gone back, climbed up this pole and turned off the current. * * * You are confined in this case to deciding whether the defendant's servants were guilty of negligence after they discovered the broken wire and while they were mending it; and you know, as well as I, that, when I speak of care, it means such care as a man of ordinary prudence and ordinary wit would apply to the work he was doing. * * * You must adapt your care to the work you are doing. So, in deciding whether these people acted sensibly and prudently and with ordinary care, you must remember what they were doing. * * * I referred to the conditions before the wire broke, to show you that he knew the danger of the wire, what it was, and that he picked it up with dry wood and put it over the fence. Did he, in backing out, or walking out, of this boiler house in the way you find he did, use the care and that watchfulness that a man should do, stepping near a deadly thing? * * * Now, suppose you find that the company's servants were negligent men, and that Golden was not negligent; then you come to the question of how much you should pay him."

The plaintiff's counsel also asked the court to charge:

"If the defendant's employees, in repairing the broken wire while the deceased was inside the boiler house, carelessly allowed a portion of the live wire to reach the ground near the doorway of the boiler house, and the deceased, without knowing the live wire was near the doorway, and while exercising care, came out of the doorway, and came in contact with the live wire near the door, while stepping out of the door, and received a shock which caused his death, the defendant is responsible."

The Court: "I will leave that to the jury. That is a second summing up. (Exception.)"

The court theretofore had fully and sufficiently charged the law, and it was not bound to reiterate it in the proposition presented, or in the form of that proposition. *Rexter v. Starin,* 73 N. Y. 601.

The court was also requested by the plaintiff's counsel to charge that:

"The intestate was lawfully in the boiler house, and was not obliged to apprehend danger from a live wire on the ground immediately at the entrance of the boiler house, if it was not there when he entered the house."

The Court: "I will leave all these questions to the jury. It is a question of fact."

Exception was then taken. Whether the intestate was "obliged" to apprehend danger manifestly depended upon the surrounding facts and circumstances. Assume that the jury found that the intestate was fully apprised of the thrice deadly character of the wire, and that it credited the testimony of Mr. Wallace, one of the repairers, that while they were laying out their work the intestate was "around there," that he "stood for quite a while in full

view of us doing the work," and that he remained in the boiler house only five minutes, or even that while he was in the boiler house, as testified to by plaintiff's witness Stroebel, the linemen then warned him that the wire was alive; can it be said as matter of law that he was not under a legal obligation (*i. e.*, in the exercise of due care, bound) to apprehend danger, even if the wire was not immediately at the entrance when he entered the house? The request is, not that he was not to apprehend that a live wire would be near the entrance to the house, but that he was not to apprehend danger from a live wire near the house, if the wire were not near the house when he entered it.

The court, under exception, charged:

"Whatever was the cause of the breaking of the defendant's wire, and whosesoever fault it may have been, the deceased was required to exercise the care of a reasonably prudent man to avoid contact with the wire, and if he knew its location, or if he ought to have known it, and neglected to keep a reasonably safe distance from the wire, and therefore came in contact with it by accidentally stepping upon it, there can be no recovery in this action."

This is objected to, in that the court did not charge the jury that the plaintiff's negligence must be such as contributed to the accident. I think this is hypercriticism. The theory of the plaintiff was that death was caused by electrocution. The negligence referred to is that of coming in contact with the living wire, which was, of course, a contributing cause.

The court also charged, under the plaintiff's exception:

"If the deceased, knowing the proximity of this wire and the danger thereof, became preoccupied in any way and forgot about the danger, and his so doing

"And his so doing was a failure to remain as alert and watchful as a reasonably careful man should under the circumstances."

Examination of the opinion in Lewis' Case will show that the gist of the criticism is that the jury might have understood that negligence of the defendant might be based upon the omission of the engineer to do any act which the jury at the time of trial might have believed would have prevented the collision. The charge in the case at bar is not that mere preoccupation and forgetfulness of the intestate defeated recovery, but a preoccupation and forgetfulness that was inconsistent with the conduct of a reasonably careful man under the circumstances. Under this charge, the jury were free to find a verdict for the plaintiff, even though he were preoccupied and forgetful, provided he was, notwithstanding such lapse, in the exercise of due care.

The exception to the testimony that the dangerous character of the wire had been theretofore called to the attention of the intestate is not well taken. The objection was taken subsequent to the testimony, and the remedy of the plaintiff was a motion to strike it out. *Link v. Sheldon,* 136 N. Y. 1, 9, 32 N. E. 696. Even if erroneously admitted, it bore solely upon the question of notice, which, beyond dispute, was fully proven by competent evidence. In no event, therefore, could it justify the disturbance of the verdict.

The judgment and order should be affirmed, with costs. All concur, except Hooker, J., who dissents.

WOFFORD & RATHBONE v. BUCHEL POWER & IRRIGATION CO.

Texas Court of Civil Appeals — April 19, 1904.

35 Tex. Civ. App. 531, 80 S. W. 1078.

BREACH OF CONTRACT TO FURNISH CURRENT TO RUN MOTOR TO ITS WARRANTED CAPACITY. — In an action to recover damages for the breach of a contract to furnish sufficient electrical current to operate a motor to its warranted capacity, it was held that the defendants' obligation was meas-

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Breach of Contract to Furnish Current. — Breach of contract to furnish electric power to run elevator. See *Kimball Bros. Co. v. Citizens' Gas & Electric Co., post,* 118 N. W. 891. See also the following cases in this volume: *Stone v. Schenectady Ry. Co., post,* 99 App. Div. 44, 90 N. Y. Supp. 742; *Terrace Water Co. v. San Antonio L. & P. Co., post,* 1 Cal. App. 511, 82 Pac. 562.

ured by the warranted capacity of the motor, and not the amount which by actual experiment it might be found able to endure.

Appeal by plaintiffs from a judgment for defendant. *Affirmed.*

Kleberg, Grimes & Schleicher and *Davidson & Bailey,* for appellants.

George J. Schleicher and *Denman, Franklin & McGown,* for appellee.

Opinion by GILL, J.:

This is a suit by appellants to recover of the appellee, a corporation, damages alleged to have resulted from a failure on the part of appellee to furnish to appellants sufficient electrical current to operate to its warranted capacity a 75-horse power electric motor used by them for pumping water for irrigation purposes, and which current the appellee had contracted to furnish. A trial by jury resulted in a verdict for appellee.

The appellants were the owners of 340 acres of land near the Guadalupe river, in De Witt county, upon which they wished to grow rice by irrigation from the river. The appellee was a corporation engaged in the generation and sale of electric current for lighting and power. The appellants, having determined to operate their pump by electric power, concluded to purchase an electric motor from the General Electric Company. Having had no previous dealings with that concern, they induced the appellee, through its officers, to make the purchase for them, which they

rice, and the irrigation begun. Fifty acres were properly irrigated, and made a full crop. Forty-five acres, for want of sufficient water, made only a partial crop. The remainding 240 acres produced nothing, for want of water.

On the general question of liability two controlling issues were presented by the pleading and proof, viz., what was the warranted capacity of the motor? and whether appellee had furnished sufficient current under the contract. Upon these points the evidence was conflicting, but was ample to sustain the conclusion that sufficient had been furnished to operate the motor to its warranted capacity when properly handled.

By the first and third assignments, appellants complain of the refusal of the trial court to give their first requested charge, which is in the following langue:

"Plaintiffs request the court to instruct the jury that the warranted capacity of the electrical motor described in the contract upon which plaintiff sues is 75 horse power, but any additional horse power which said motor could safely develop, and which was required to perform its work in operating the pump which it was intended to operate, is also within the warranted capacity of said motor, within the meaning of said contract."

The court did not err in the respect complained of. To the charge requested there are at least two fatal objections: In the first place, the warranty as to the horse power of the motor not being evidenced by writing, and being a matter in dispute, the charge was manifestly on the weight of evidence; and, second, it assumes that the appellees contracted to furnish such quantity of current as the motor would safely stand, however much horse power it might develop, if plaintiff's pump required more to perform the work put upon it. There was testimony to the effect that, with the current furnished, the motor was sometimes required to develop double the horse power mentioned in the contract, though under normal conditions 65-horse power was ample to lift 4,200 gallons of water per minute — the amount the pump was expected to lift. It is manifest from the terms of the contract that the appellee's obligation was measured by the warranted capacity of the motor, and not the amount which by actual experiment it might be found able to endure. The trial court, in his general charge, properly left to the jury the issue of warranted capacity, to be found as a fact, as well *as the issue of due performance of its contract on the part of appellee.* This disposes

also of the second assignment, which assails the court's general charge upon the point.

The fourth and fifth assignments are addressed to the court's general charge on the measure of damages, and the refusal to give special charges upon that issue. We are of opinion the matters complained of, if error, are immaterial, as the verdict is manifestly based on the issue of liability, and the jury did not reach the issue of damages.

The sixth assignment complains of the introduction of certain letters and telegrams received by the appelle from the General Electric Company during the negotiations for the purchase of the motor for appellants. They were adduced over appellant's objection upon the issue of warranted capacity. We are of opinion they were admissible. There is some evidence tending to show they were shown to Rathbone, one of the appellants, and further it appears that appellee acted as the agent of appellants in the purchase of the motor. Communications addressed to them, containing warranties as to the power of the motor, would inure to the benefit of appellants, and were admissible on the issue.

The seventh, eighth, ninth, and tenth assignments complain of the action of the court in sustaining exceptions to the supplemental motion for new trial. Within two days of the rendition of the judgment a motion for new trial was duly filed. Twenty days later, and shortly prior to the adjournment of the court, they filed a supplemental motion, which set up the following additional facts: The jury which tried the cause did, before they were impaneled, visit appellee's power plant, and were probably influenced in their verdict by what they saw. The motion shows that the fact was known to appellants before the jury were selected to try the cause. Second. Because the jury discussed the case among themselves before the cause was submitted to them by the charge of the court. Third. That Tom Smith, one of the jurors, was approached by some unknown person, and told not to decide the case according to his own judgment, but to go with the white men on the jury. The motion did not disclose when these facts came to the knowledge of appellants, or why they were not sooner presented. It was not sworn to, nor were there any supporting affidavits. The motion was excepted to on the ground that it was not made within two days of the date of the judg-

ment, nor reasons given for not sooner presenting the facts, and, further, because it was not sworn to. These exceptions were sustained, and appellants refused to amend. The first ground was manifestly too vague to require consideration. As to the second and third grounds, they presented matter requiring an investigation of the facts. The motion was not sworn to. It did not disclose the names of the witnesses by which its allegations were to be established, nor in any other way point out the means by which the court might inform himself of the facts alleged. A motion for new trial filed later than two days after the judgment is addressed to the trial court's discretion, and we are unwilling to hold that the trial court abused that discretion by refusing to institute a general investigation of the unsworn allegations of the supplemental motion, especially when appellants refused to swear to it or append affidavits, or otherwise amend, after the exceptions were sustained.

We find no reversible error in the record. The judgment is therefore affirmed.

Affirmed.

COMMONWEALTH ELECTRIC CO. v. MELVILLE.

Illinois Supreme Court — April 20, 1904.

210 Ill. 70, 70 N. E. 1052.

1. ELECTRICITY — CARE REQUIRED. — Electricity is a subtle and powerful agent. Ordinary care, exercised by those who make a business of using it for profit, to prevent injury to others therefrom, requires much greater precaution in its use than where the element used is of a less dangerous character. The care must be commensurate with the danger.

2. ELECTRIC CABLE BENEATH SIDEWALK — DEFECTIVE INSULATION — INJURY TO BOY. — An electric company, pursuant to a city ordinance, placed an electric cable beneath the sidewalk. There was no access to the cable from the street, but there was access from an abutting lot. The cable was defectively insulated, and a boy attracted to the place by a fire

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Care Required of Electric Companies. — See *Guest v. Edison Illuminating Co., post*, and note thereunder.

When Trespasser May Recover. — See note to *Daltry v. Media Electric Light, Heat & Power Co., ante.*

Attractive Nuisances. — See note to *Mayfield Water & L. Co. v. Webb's Adm'r, post.*

caused by the grounding of the current was injured by coming in contact with the cable. *Held*, that the company was liable for the boy's injury.

3. SAME — TRESPASSER. — A boy going beneath a sidewalk, where there is an electric cable, there being nothing to prevent access, is not a trespasser so as to prevent his recovering for injury received by coming in contact with the cable.

4. SAME — CONTRIBUTORY NEGLIGENCE. — In an action to recover for injuries received by coming in contact with a defectively insulated electric cable beneath a sidewalk, the question of contributory negligence *held* one for jury.

5. SAME — TRAPS — ATTRACTIVE NUISANCES. — The doctrine of traps or of attractive nuisances is not applicable where boys accustomed to play beneath a sidewalk, where an electric company maintained a defectively insulated electric cable, were injured by coming in contact with the cable.

Appeal by defendant from a judgment of the Appellate Court (110 Ill. App. 242), affirming a judgment in favor of plaintiff. *Affirmed.*

Statement of facts by SCOTT, J.:

This is an appeal from a judgment of the Appellate Court for the First District, affirming a judgment for $3,500 rendered against appellant in the Circuit Court of Cook county as damages for a personal injury sustained by David Melville, the appellee. The injury was caused by contact with an electric wire or cable, belonging to the defendant, which had been placed underneath a wooden sidewalk on Ogden avenue, in the city of Chicago. This sidewalk passes in front of a vacant lot. On one side of the lot is a building used for a barber shop, and on the other side is a building referred to as a "brick building." The sidewalk in front of those premises is about five feet above the ground over which it is built. The surface of the vacant lot is almost on a level with the ground under the sidewalk, and the surface of the street is a little lower than that of the lot. The sidewalk is nine or ten feet in width. The curbstone extends from the surface of the street up to the outer edge of the sidewalk, and separates the space below the sidewalk from the street. The space in front of the barber shop and that in front of the brick building are inclosed on all sides, and are used for storing coal. Both are separated from that in front of the vacant lot by wooden partitions. The space in front of the lot is not inclosed on the side next to the lot, and there is nothing to prevent a person on the lot from going under the sidewalk. There is no fence at the back of the lot, which opens on an alley. In front of the lot, extending up from the inner edge of the sidewalk, is a billboard about twenty feet in height. There is a space of from two to three feet between the sidewalk and the bottom of the billboard, so that a person seeking access to the lot from the street would have to crawl through the space between the sidewalk and the billboard. The electric wire or cable of the defendant was fastened to the under part of the sidewalk, and lay either alongside or on top of the curbstone, or stone wall which separates this space from the street.

On October 22, 1900, this wire became out of order, and the electricity escaping from it set fire to the lower part of the sidewalk to which it was

fastened, causing smoke to come up between the boards of the sidewalk in front of the barber shop and for quite a distance along the block, but not in front of this vacant lot. This attracted a considerable number of men and boys, among them the plaintiff, who was a boy fourteen years of age. The cause of the smoke had not been discovered when appellee, in company with two other boys, crawled through the space between the sidewalk and billboard, dropped down to the lot, and from there went under the sidewalk over to the farthest side, next to the curbstone or stone wall. Plaintiff's two companions looked through a hole in the partition which separated the space in front of the lot from that in front of the barber shop, and saw the sidewalk on fire where the wire or cable was attached to it in front of the shop. Plaintiff then attempted to look through the hole, but in some way slipped, threw his right hand up, and caught hold of the wire, which at that place sagged down from the sidewalk several inches, thereby receiving a shock which rendered him unconscious, and the wire burned his hand to such an extent that its usefulness is greatly impaired and the hand is permanently injured.

The evidence for the plaintiff tends to show that this cable consisted, first, of a copper wire which carried the electricity. This was inclosed by the insulating material, and the whole was covered with lead, except at the joints, where the wire and insulation were incased by another insulating material. When new, the cable had an outside covering of jute. This had worn off or decayed in many places, leaving the lead, which is a conductor of electricity, exposed. A "ground," as that term is used by electrical experts, is occasioned by a defect or break in the insulation, which permits the current to escape from the copper wire to the lead covering, and from there to the earth. In such instances the current is carried along the cable by the lead, and communicated to anything with which the lead comes in contact. The evidence also tends to show that this cable had been "grounded" in the vicinity of the accident on several occasions shortly prior to the time of the injury; that it had been in use for a period of from eight to fourteen years; that the wire in the circuit of which it was a part had frequently been repaired by removing pieces of the cable and replacing them with new cable, but that portions of the cable as originally placed were still in use on the circuit; that a short distance from the place where the injury occurred the circuit had been out of order about two weeks before October 22; that at that time there was a "ground" on the circuit, and defendant's employees, in attempting to locate the trouble, had gone under the sidewalk in front of the vacant lot; and that on the day preceding the injury to the plaintiff the wire was out of order under the sidewalk in front of the adjoining lot. The evidence further tends to show that the vacant lot had been used by children of the neighborhood as a playground for a considerable period prior to October 22, 1900; that children often went under the sidewalk from the lot when playing games, and sometimes for shelter from the sun or rain.

The declaration, as originally filed, consisted of three counts. Afterwards additional counts were filed. At the close of plaintiff's evidence, and at the close of all the evidence in the case, the defendant moved the court to give to the jury an instruction to find the defendant not guilty, and at the same time offered an instruction which directed the jury to return a verdict. The court overruled the motion and refused the instruction in question. The errors assigned and urged by appellant for a reversal of

the cause are: First, that no count of the declaration states a cause of action; and, second, that the court should have given the peremptory instruction.

F. J. Canty and *R. J. Folonie,* for appellant.

Ela, Grover & Graves, for appellee.

Opinion by SCOTT, J.:

It is urged that the declaration herein does not state a cause of action. This question arose in the Circuit Court upon a motion in arrest of judgment. Appellee, upon leave obtained in this court, has filed here a certified copy of the brief and argument of appellant which was filed in the Appellate Court. It appears therefrom that in that court the insufficiency of the declaration was not suggested; but it is said that, where a declaration omits to aver a material fact essential to a valid cause of action, the judgment will be reversed, although no question is made below. It is unnecessary to discuss this proposition, as the authorities cited in support thereof do not apply in a court of review, where the question is pending on appeal from or writ of error to an intermediate court, which is likewise a court of review. We can only determine whether the Appellate Court decided correctly. *National Bank v. Le Moyne,* 127 Ill. 253, 20 N. E. 4 In doing this it is manifest we can consider no matters exce those which were presented to that court. *Sherwood v. Illinc Trust & Savings Bank,* 195 Ill. 112, 62 N. E. 835, 88 Am. S Rep. 183. We will not consider an error assigned on the reco

It is earnestly insisted on the part of the electric company that the relation of the plaintiff to the defendant was that of trespasser or licensee, and that, consequently, the defendant was not liable, unless the injury to the plaintiff resulted from some willful or wanton act of the defendant. We think this a misapprehension. The only right the electric company had under the ordinance was a right to place its wire under the sidewalk. It was entitled to permanently occupy no more space for that purpose than was necessary for the wire and any devices used to protect the wire and to keep persons from coming in contact therewith. It had no right or permission to occupy the whole of the space under the sidewalk where the accident occurred. It appears that there was nothing to prevent access from the alley in the rear to the lot fronting on this space; that boys were in the habit of playing on that lot, and passing into this space under the sidewalk to shelter themselves from rain or sun, or for any other purpose that occurred to them; and that this was done without objection from the owner of the lot or the city, and on the occasion of this accident the plaintiff went under this sidewalk in company with three other boys, one of whom, at least, had been in the habit of playing in the lot. It is manifest that it was not the purpose of the city that the public should have access to and use this space as it did the space above the sidewalk. If, however, the curb, which was at the outer edge of this sidewalk and prevented access to the space from the street, had not been there, there could be no question but that the public would have had the same right to pass under this sidewalk from the street that they would have to pass under a stairway or platform of a station of an elevated railway located in the street. There the public has, and exercises, the right to pass over the same portion of the street on two different levels, and it seems apparent that the public would have the same right to pass upon this space, where they came upon it from an abutting lot, in the absence of objection from the lot owner. Plaintiff was, therefore, rightfully in this space, and he was not there by the leave or license of the defendant. The same rule does not apply to him as applies to one who goes upon the property of another, whether with or without permission. He was not upon property either owned or controlled by the defendant.

It is then urged that he became a trespasser when he laid his hand upon the wire, by virtue of his act in touching the wire without the permission of the owner thereof, and *Hector v. Boston Electric Light Co.*, 5 Am. Electl. Cas. 300, 161 Mass. 558, 37 N. E. 773, 25 L. R. A. 554, is referred to in support of this position. In that case the plaintiff received the injury while upon the roof of a building where he had no right, and where he was neither invited nor licensed to be. The distinction is apparent. Plaintiff's act in taking hold of the wire was an accident. The injury resulted from that accident, and, while it may be conceded that he had no right to take hold of the wire, the question still remains, who was responsible for the injury that resulted from his accidental contact with that wire? So far as being in the space under the sidewalk was concerned, plaintiff had the same right to be there that the defendant had; but he could not rightfully interfere with the property of the defendant, or occupy the space already pre-empted by it. Appellant urges that the rights of the parties to be in this space were not equal, for the reason that was there in pursuance of the terms of an ordinance and could not be summarily ejected, as the plaintiff, perhaps, might be. This is wholly immaterial. The question is, not how long either party had the right to remain, but what right they had to be there the instant of the accident.

The evidence tends to prove that the electric cable passing along under this sidewalk had been in use from eight to fourteen years; that in some places the insulation was defective; that the cable h

powerful agent. Ordinary care, exercised by those who make a business of using it for profit, to prevent injury to others therefrom, requires much greater precaution in its use than where the element used is of a less dangerous character. As there is greater danger and hazard in the use of electricity, there must be a corresponding exercise of skill and attention, for the purpose of avoiding injury to another, to constitute what the law terms "ordinary care." The care must be commensurate with the danger. 10 Am. & Eng. Enc. of Law (2d ed.), p. 873; *Alton Illuminating Co. v. Foulds*, 7 Am. Electl. Cas. 548, 190 Ill. 367, 60 N. E. 537; *Perham v. Portland General Electric Co.*, 7 Am. Electl. Cas. 487, 33 Or. 451, 53 Pac. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; *McLaughlin v. Louisville Electric Light Co.*, 8 Am. Electl. Cas. 255, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812; *Ennis v. Receiver*, 5 Am. Electl. Cas. 325, 87 Hun, 355, 34 N. Y. Supp. 379. We are of the opinion that the appellant's failure to use some device to guard its wires in this space under this sidewalk, so that no person could inadvertently touch the cable, tended to show a lack of ordinary care.

It is urged, however, that the plaintiff was guilty of contributory negligence, as a matter of law, in going under the sidewalk; and we are referred to the case of *Heimann v. Kinnare*, 190 Ill. 156, 60 N. E. 215, 52 L. R. A. 652, 83 Am. St. Rep. 123. This is a case where a boy lost his life by drowning. A small pond was partly filled with water, and the water was partly covered with ice; there being an open space of water around the edge of the ice. For the purpose of ascertaining if the ice thereon was strong, he ran down an incline leading to the water, jumped over the open water upon the edge of the ice, and ran out toward the middle of the pond, where the ice gave way and he was drowned. He knew, before going there, that the water was beyond his depth. He had knowledge of the danger consequent on the breaking of the ice. In the case at bar the plaintiff did not know that the wire in question was under the sidewalk, and did not know that there was danger there of the kind he encountered. He was attracted to this place by fire in the vicinity, occasioned by the "grounding" of this wire. At the place where the accident occurred he was not near enough to the fire so occasioned to be in danger from the f

itself, and while negligence cannot be attributed to the defendant for a failure to correct the difficulty which had resulted in the wire being "grounded" on this occasion, as it does not appear that it either had or ought to have had notice that the wire was so "grounded," still it was natural for the boy to gratify his curiosity by going into this space for the purpose of looking at the fire, and in so doing he went where he had a right to go, and where he had no reason to anticipate any serious danger. The question of contributory negligence was one for the jury.

We do not think the doctrine of traps, or that of attractive nuisances, applicable. No other errors have been discussed. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

ROCKINGHAM COUNTY LIGHT & POWER CO. v. HOBBS.

New Hampshire Supreme Court — May 3, 1904.

72 N. H. 531, 58 Atl. 46.

EMINENT DOMAIN — WHEN SUPPLYING ELECTRIC POWER PUBLIC USE. — An electric light and power company, authorized by statute "to take and hold and to purchase and hold such lands and interests in land as may be reasonably necessary to carry out the purposes and objects for which it was organized," its purpose being to generate or collect electricity and store, transmit, and sell it to those desiring it for any use to which it is applicable, may take private lands for the construction of its lines as such taking is for a public use.

ing, transportation, propulsion of cars, machines, and engines, and for all mechanical, commercial and business purposes, electricity and gas and all other illuminants and motive powers; to set poles and stretch wires to conduct and transmit the same, and to install and lay all necessary means or instrumentalities for conducting, storing and transmitting the same." It is located at Portsmouth, and its business is to be carried on in the towns and cities of Rockingham and Strafford counties, and in Alton, in Belknap county. By section 5, ch. 195, p. 679, Laws 1901, it was authorized "to take and hold and to purchase and hold such lands and interests in land as may be reasonably necessary to carry out the purposes and objects for which it was organized." The intention of the legislature to delegate to the corporation the right to take land without the owner's consent is unmistakably shown by the use of the words "to take" — especially when read in connection with the words "to purchase" immediately following — and by the provision made for the location of the land taken and payment of the owner's damages. The plaintiff relies upon this statute for its authority to take the desired interests in the defendant's land. It proposes to construct and maintain a line of wires extending from a point in Hampton in a straight line to a point in East Kingston, and from the latter point in a straight line to a point in Salem — a distance of about twenty-three miles. This line crosses the defendant's land, and in the location which the plaintiff has filed (Pub. St. ch. 158, §§ 26, 34) it particularly describes the line and the interest in land taken. The latter is, in substance, so far as the defendant's land is concerned, the right to set and forever maintain four poles of a certain size and height at designated points in the line; to string as many as fifteen wires upon cross-arms attached to the poles, not less than eighteen feet above the surface of the ground; to cut all trees within one rod either side of the line, and trim other trees whose branches extend within this space; and to enter upon the land as occasion requires for the purpose of inspecting, repairing and renewing the poles, wires and appurtenances. The location further states that "there are to be transmitted along and upon said wires a high potential electric current to be used in operating street railroads, for power, lighting, and for other purposes; and other weaker electric currents may be transmitted along and upon said line for various

purpose." The plaintiff's real purpose is to furnish power for the operation of the lines of electric railway located west, south and east of Salem. It also intends, if it has occasion, to furnish power for any of the purposes authorized by its charter. It is reasonably necessary to take the specified interest in the defendant's land to carry into effect the corporation's purpose.

Article 12 of the Bill of Rights forbids, by implication, the taking of private property for private uses without the owner's consent. *Concord R. R. v. Greely,* 17 N. H. 47; *Underwood v. Bailey,* 59 N. H. 480. Unless, therefore, the use which the plaintiff proposes to make of the defendant's land is a "public use," within the meaning of those words as used in the bill of rights, the legislature had no power to grant to the plaintiff the right to take the land or an interest in it, without the defendant's consent. Whether the contemplated use is of a public character is a question of law. *Concord R. R. v. Greely, supra; Amoskeag Mfg. Co. v. Head,* 56 N. H. 386, 399. The bill of rights contains no definition of "public uses," and the court has not attempted to formulate one. "That is left to be determined in each individual case by reference to the principles and reasons upon which the right to take private property for public use is founded, and by authority." *Great Falls Mfg. Co. v. Fernald,* 47 N. H. 444, 455. It has been held in this State that the use of land for the following purposes is a public use: For a turnpike (*Petition of Mt. Washington Road Co.,* 35 N. H. 134); for a toll bridge (*Piscataqua Bridge v. New Hampshire Bridge,* 7 N. H. 35); for a highway (*Pierce v. Somersworth,* 10 N. H. 369; *Backus v. Lebanon,* 11 N. H. 19, 35 Am. Dec. 466); for a railroad (*Concord R. R. v. Greely,* 17 N. H. 47; *Northern R. R. v. Railroad,* 27 N. H. 183); for a public cemetery, it seems (*Crowell v. Londonderry,* 63 N. H. 42; *Evergreen Cemetery Association v. Beecher,* 53 Conn. 551, 5 Atl. Rep. 353); and for making a survey by the United States as a part of the coast survey (*Orr v. Quimby.* 54 N. H. 590). In all these cases, excepting the last, the public have a common and equal right to the use of the land taken, for the purposes for which it was taken, subject to certain reasonable limitations, conditions and regulations. In fact, the principal object of the taking is the accommodation of the public; and whatever benefit the corporation, through whose agency the right of eminent domain is

exercised, derives therefrom, is incidental to the main object, and is compensation for money, services, and skill contributed by it to the furtherance of that object. The decision in *Orr v. Quimby, supra*, is based on the idea that the use of the land for the purposes of the coast survey is necessary in order to provide "a safe highway upon the ocean" — which, it was remarked, "is as much a public necessity as a safe highway upon the land."

It has also been held that the owner or occupant of land upon a stream of water may by erecting a dam on his land, take the right to flow the lands of others without their consent, for use in connection with his mills, by complying with the provisions of the statute authorizing such taking, and that the use of land flowed under such circumstances is a public use within the meaning of the constitution. Pub. St. ch. 142, §§ 12–19; *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444. Although attempts have been made to have this question reconsidered, and the reasons given for the decision have been vigorously attacked (50 N. H. 592; 56 N. H. 338), the court have regarded the question as settled, and have declined to reopen it (*Ash v. Cummings*, 50 N. H. 591; *Amoskeag Mfg. Co. v. Head*, 56 N. H. 386; *Amoskeag Mfg. Co. v. Worcester*, 60 N. H. 522; *Amoskeag Mfg. Co. v. Goodale*, 62 N. H. 66). In speaking of the mill act, LADD, J., said, in *Salisbury Mills v. Forsaith*, 57 N. H. 124:

> "I agree with counsel for the defendant that the act goes to the verge of the constitutional power of the legislature, and I may say that, but for the authorities by which the court thought they should be governed in the late case of *Amoskeag Co. v. Head*, I should find great difficulty in sustaining it."

See, also, the remarks of the same judge in the case referred to, 56 N. H. 400. The courts of other States have given a like interpretation to similar provisions of their constitutions with reference to flowage. Lewis, in his work on Eminent Domain, after reviewing the decisions, concludes that "the only possible basis upon which the mill acts can stand is that mills are a public use, within the meaning of the constitution," and that "this can only be true of that class of mills which are obliged to serve the public, and unless the acts are limited to such mills, they cannot be sustained." 1 Lew. Em. Dom., §§ 176–183. It would seem, therefore, that the doctrine of *Great Falls Mfg. Co. v. Fernald*, and like cases, is *sui generis*, and is not applicable *to the full extent of its import in cases other than those specially relating to the taking of flowage*

rights. These cases cannot be regarded as deciding that "public use" in the bill of rights is synonymous with public benefit, public advantage, or any use that is for the benefit and welfare of the State. Whatever was said by PERLEY, C. J., in the Fernald case, having a tendency to show that such was his view, must be understood as having reference to the facts of that case, and not as expressing a general rule to be applied whenever the question of public use arises.

That the use of land for constructing and maintaining a line of wires to conduct currents of electricity employed in transmitting intelligence by telegraph or telephone for all persons who may desire such service, or in lighting public streets, highways, and buildings, etc., or in moving the cars of a railway serving the public, is a "public use" within the narrower meaning of those words as applied in the above cited cases, is beyond question. Pub. St. ch. 81, § 13; Laws 1895, p. 367, ch. 27. It has been so held in other jurisdictions. *Pierce v. Drew,* 1 Am. Electl. Cas. 571, 136 Mass. 75, 49 Am. Rep. 7; *Duke v. Telephone Co.,* 53 N. J. Law, 341, 21 Atl. Rep. 460, 11 L. R. A. 664; 1 Lew, Em. Dom., § 172. Electricity is also extensively used for the transmission of power from the point where the power is accumulated by means of a waterfall, or by the combustion of fuel, to distant points for use there; and the prospect is that it will be used in the near future to produce and distribute heat in a similar manner. That the use of and for the production and distribution of power may be a public use is shown by the mill acts and the decisions respecting them, above cited. In the Fernald case the dam and land flowed were several miles distant from the mills which used the water, and in *Amoskeag Mfg. Co. v. Worcester,* 60 N. H. 522, more than half of the water of the mill pond created by the dam was used by other corporations and companies, who paid rent to the plaintiffs therefor. If the corporations and companies using the water had been *quasi*-public — if they were engaged in a public service, like that of grinding grain for all parties who had occasion for such service, without discrimination in rates or other terms — and if the plaintiffs in those cases, so long as they had a surplus of water, were ready and willing to supply it upon like terms to all corporations or persons desiring it for such uses, the *decisions would not* be subject to the criticism above mentioned.

The knowledge recently acquired concerning electricity has made it possible to divide power into any desired portions, and to freely transmit the same to almost any point for use. This has created a demand for power, which, though not so universal as the demand for water, is nevertheless a public character. Like water, electricity exists in nature in some form or state, and becomes useful as an agency of man's industry only when collected and controlled. It requires a large capital to collect, store, and distribute it for general use. The cost depends largely upon the location of the power plant. A water power or a location upon tide water reduces the cost materially. It may happen that the business cannot be inaugurated without the aid of the power of eminent domain for the acquisition of necessary land or rights in land. All these considerations tend to show that the use of land for collecting, storing, and distributing electricity, for the purposes of supplying power and heat to all who may desire it, is a public use, similar in character to the use of land for collecting, storing, and distributing water for public needs — a use that is so manifestly public "that it has been seldom questioned and never denied." 1 Lew. Em. Dom., § 173.

The defendant has called attention to the recent case of *In re Rhode Island, etc., Co.*, 22 R. I. 457, 48 Atl. Rep. 591, 52 L. R. A. 879, in which it was held that the use by an electric railway company of land situated five miles from its railroad line for a power house and coal pockets was not a public use within the meaning of the constitution of that State, which in this respect is similar to that of this State. The decision is based on the proposition that the location of the power house on the particular lot in question was not essential to the public service, but pertained only to the private interest of the company in its business details. With the knowledge of electricity thus far acquired, an electric railway cannot be operated without generating or collecting electricity in large quantities and transmitting it from the initial point to and along the railway. A power house, or something answering the same purpose, is as essential to the public service as is the railway track itself. The court truly say in the Rhode Island case:

"There is a class of cases where the public does *not use the land itself*, and yet the public *necessity is so direct and obvious as to imply a public use. Such, for example, are cases of taking land for engine houses*, car houses,

and repair shops on steam railroads. These buildings must necessarily be contiguous to the railroad; and while the public may not use the buildings as such, yet they are of such a character that, without them, the public cannot adequately use the road itself. They are, in fact, a part of the railroad."

See 1 Lew. Em. Dom., § 170. This is emphatically true of the power house in the case of an electric railway; but because of the difference in the necessities in the two cases — a particular location adjoining the railroad line usually being imperatively necessary for an engine house, etc., of a steam railroad, while an electric railway company has greater freedom of choice as to the location of its power house — the court held that the principle of the steam railroad cases referred to was not applicable to the taking of land for the latter purpose. It is probable that in many cases the establishment and operation of electric railways for the accommodation of the public will depend upon the possibility of generating or collecting electricity at a low cost. A water power, or a port at which coal may be landed from seagoing vessels directly into the coal pockets of a power house, will render it possible to furnish electric railway facilities for public use at points situated many miles distant from the power house or port, that could not otherwise be furnished at all, or, at least, without much greater cost to the public. In such cases the imperativeness of the necessity attaches to the freedom of choice as to location, rather than to the proximity of a particular location to the railroad line. If land adjoining an electric railway may be taken for a power house — as to which there can be no doubt — no good reason is apparent why land at a distance may not be taken if the public good so requires. Of course, if land located at a distance may be taken for a power house, it must follow that necessary land or rights in land may be taken for constructing and maintaining a line of wires between the power house and the railway. As has already been intimated, like reasons may exist for having the power house of an electric light company, or other public service company, located at a distance from the place where the public service is rendered.

But it is not the intention of the plaintiff to make use itself of the electricity which it generates or collects in either of the ways above mentioned, except possibly that of electric lighting. In fact, the plaintiff has no authority to engage in the business of transmitting intelligence by telegraph or telephone, or in a manufacturing business, or in operating a railroad. In this respect the

case differs esesntially from *Fallsburg Power & Mfg. Co. v. Alexander* (Va.), 43 S. E. Rep. 194, 61 L. R. A. 129, cited by the defendant. Its purpose is to generate or collect electricity, and store, transmit, and sell it to those desiring it for any use to which it is applicable. Its business in respect to electricity closely resembles that of an aqueduct company in respect to water. This business differs materially in several important respects from that of selling fuel and other articles of daily use. The capital and enterprise of private individuals are ordinarily sufficient for the latter purpose. It is not important that the business of dealing in such articles should be conducted in a single large enterprise, with supplies emanating from a single source. The business does not require the exercise of any governmental function. But, as has already been suggested, the collection, storing, and distribution of electricity, like the collection, storing, and distribution of water, requires large capital, favorable conditions, the use of the public streets, and sometimes the exercise of the right of eminent domain. *Opinion of the Justices,* 182 Mass. 605, 608, 66 N. E. Rep. 25; *Opinion of the Justices,* 150 Mass. 592, 24 N. E. Rep. 1084, 8 L. R. A. 487.

If the plaintiff is under obligation to supply electricity or electric energy at reasonable rates, and without discrimination, to all corporations, public, *quasi*-public, and private, and to all persons desiring it, who are located within reasonable distances of the plaintiff's lines, so far as the extent and capacity of its works will permit, it appears to have all the characteristics of a *quasi*-public corporation. Its articles of association do not in terms impose this obligation upon it. They are, however, entirely consistent with the existence of the obligation. When the interpretation is considered which the plaintiff has given to the agreement by its acts in locating lines of wires in the public highways, and in procuring and attempting to exercise the right of eminent domain, it is apparent that the plaintiff intended by its articles of association to take upon itself the obligations of a *quasi*-public corporation in respect to the sale of electricity and electric energy. The delegation of the power of eminent domain to a corporation is not always accompanied with an express imposition of the obligation to serve the public reasonably and equitably. A corporation, by the acceptance and exercise *of the power, impliedly undertakes*

such service respecting the subject for which the power is exercised. *Lumbard v. Stearns,* 4 Cush. 60; *Trenton & N. B. Turnpike Co. v. News Co.,* 43 N. J. Law, 381. In the numerous charters that have been granted to aqueduct companies in this state, containing authority for the exercise of the right of eminent domain, few, if any, have provisions specifying their public duties. The following are examples: Laws 1851, ch. 1190; Laws 1863, p. 2776, ch. 2817; Laws 1870, p. 473, ch. 83; Laws 1872, p. 67, ch. 95; Laws 1883, p. 133, ch. 191; Laws 1897, p. 148, ch. 155; Laws 1901, p. 810, ch. 292; Laws 1903, pp. 198, 279, ch. 207, 272. Yet there can be no doubt that it is the duty of such corporations to supply water to persons located along their mains, without discrimination as to rates or conditions. *Olmsted v. Aqueduct,* 47 N. J. Law, 311; *Haugen v. Water Co.,* 21 Oreg. 411, 28 Pac. Rep. 244, 14 L. R. A. 424; 1 Lew. Em. Dom., § 173. "In an act authorizing a right of way to be taken for the road of a turnpike company, the public right of using the road need not be expressly asserted. * * * The legal construction of such an act is not that some public benefit indirectly accruing from a private use of the land is a public use of it, but that by the exercise of the power of eminent domain the public acquire a right of way, subject to the payment of toll to the company who bear the expense that would be borne by the public if the road were free." *Holt v. Antrim,* 64 N. H. 284, 287, 9 Atl. Rep. 389. So, in this case, the legal construction of the plaintiff's charter, as amended by the act of 1901, is that the public acquire a right to the service of the corporation upon equal and reasonable terms. *Snell v. Power Co.,* 196 Ill. 626, 63 N. E. Rep. 1082, 58 L. R. A. 284, 89 Am. St. Rep. 341. This view of the charter distinguishes the case from *Avery v. Electric Co.* (Vt.), 54 Atl. Rep. 179, 59 L. R. A. 817, cited by the defendant. The case also differs widely from *State ex rel. St. Louis Underground Service Co. v. Murphy,* 134 Mo. 518, 31 S. W. Rep. 784, 34 S. W. Rep. 51, 35 S. W. Rep. 1132, 34 L. R. A. 369, 56 Am. St. Rep. 515. In that case, the rights claimed were granted by the city of St Louis, which was not empowered to grant them nor to enforce the reserved public rights; while in this case the grant of power is direct from the State, and it retains control over the corporation, and can protect the rights of the public.

In addition to the plaintiff's duty in this regard, the legislature have power to control the plaintiff in its dealings with the public. By section 19, ch. 148, Pub. St., it is provided that "the legislature may at any time alter, amend, or repeal the charter of any corporation or the laws under which it was established, or may modify or annul any of its franchises, duties, and liabilities." This authority to control the duties of corporations was first introduced into the statutes upon the revision thereof in 1891, and furnishes additional assurance that corporations engaged in the public service, as well as other corporations shall perform their duties to the satisfaction of the public. There seems to be no question concerning the validity of the statute. *Spring Valley Water Works v. Schottler,* 110 U. S. 347, 4 Sup. Ct. Rep. 48, 28 L. Ed. 173.

Thus it is seen that all the elements of public use, in the limited sense of the words, exist in this case, and consequently that this petition may be maintained.

Exception overruled.

BARIES v. LOUISVILLE ELECTRIC LIGHT CO.

Kentucky Court of Appeals — May 3, 1904.

118 Ky. 830, 80 S. W. 814.

1. INJURY — DEFECTIVE INSULATION — PLEADING — SPECIAL DAMAGES. — In an action by a painter to recover damages for a withered arm caused by coming in contact with a defectively insulated wire, an averment that since the plaintiff received the injury he "has been and is unable to do any kind of work" is insufficient as an allegation of special damages.
2. SAME — EVIDENCE OF NOTICE TO CUT WIRES. — Evidence that plaintiff's employer and other employers had notice that the defendant desired to cut the wires, or that it was the custom, is incompetent in an action by a painter to recover damages for a withered arm caused by coming in contact with a defectively insulated wire while painting a building.
3. NEGLIGENCE — WHEN NOT IMPUTABLE. — In an action by a painter to recover damages for injury received by coming in contact with an electric wire, the neglect of his employer to notify the defendant electric company to cut the wires is not a contributory act imputable to the plaintiff.

Appeal by plaintiff from judgment for defendant. *Reversed.*

Bennett H. Young, for appellant.

O'Neal & O'Neal, for appellee.

Opinion by PAYNTER, J.:

The arm of appellant has withered and become useless by coming in contact with a live wire of appellee. It occurred while painting on a house to which the wire was attached. Appellant claims that he received the injury by reason of appellee's negligence in not having the wire properly insulated. This was the question of fact at issue on the trial of the case. The jury returned a verdict for the appellant, and fixed his damages at one cent. He asks a reversal on the grounds (1) that the verdict fixing damages is flagrantly against the weight of the evidence; (2) that the court erred to his prejudice in the admission of evidence.

It is the contention of appellee that under section 341, Code Civ. Prac., the judgment cannot be reversed because of the smallness of damages in an action for an injury to the person. The evidence shows that he was earning and could earn at his trade as a painter $15 a week, and that the time lost in consequence of his injury would equal a sum greater than $800. The loss of time resulting from a personal injury is a pecuniary loss in contemplation of section 341, and it is a ground for reversal if the verdict is for the plaintiff, and it does not award damages to cover such pecuniary loss. *Taylor v. Howser*, 12 Bush, 468; *Ray v. Jeffries,* 86 Ky. 367, 5 S. W. 867; *Stroh v. South Covington & Cincinnati Street Ry. Co.* (opinion delivered March 23, 1904), 78 S. W. 1120. This court has repeatedly held that special damages must be pleaded. It was not sufficiently done in this case. It is averred in the petition that since the plaintiff received the injury

in the employ of McKelvey, who had the contract for painting the house. It is contended that the court erred in admitting evidence that McKelvey and some of his employees had notice that appellee desired to cut the wire, when the painting should progress far enough for the men to work on that portion of the building where the wires were situated. Such evidence would be incompetent, as it would be allowing appellee to show the negligence of appellant's employer to exonerate it from a liability for negligence which was the proximate cause of the injury. The neglect of McKelvey was not a contributory act imputable to the appellant. If appellee was negligent in failing to properly insulate its wire at the place where appellant had the right to be in the discharge of his duties, it certainly could not be relieved of the consequence of its negligence because some one other than the appellant might have by performing a duty prevented the injury. While there is no evidence that such notice was given to McKelvey, evidence was admitted to show a general custom prevailed which required contractors to notify appellee they were working on a house to which its wires were attached, and when this was done it always cut the wires. This evidence was intended to show that there was a duty upon appellant's employer or himself to give the appellee notice that work was being done on the house. If that custom required the employer or his foreman to give such notice, their failure to do so could not release the appellee from the consequences of its negligence in failing to properly insulate the wires. If such evidence is admissible under any circumstances, it was not in this case, because the appellee introduced evidence showing it had notice the day before the accident that the painters were at work on the house where the accident happened, and Mr. Kinkead, one of its electricians, testified that appellee cut the wires on houses when it had such information. It is the purpose of the notice that men are at work where appellee has its wires to give it an opportunity to cut them. If it had the notice, then the evidence of the general custom (if evidence of it is admissible in any case) was not admissible in this case, for, if it had been followed, the appellee would have been told a fact of which it was already apprised. Besides, the evidence, taken in its entirety, did not show that there was any general custom which could *impose a duty upon an ordinary employee of a contractor to give such notice.* The

admission of the evidence as to the general custom was prejudicial to the rights of the appellant. In giving instructions to the jury the court seems to have followed *McLaughlin v. Louisville Electric Light Co.*, 6 Am. Electl. Cas. 255, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812, and other cases to the same effect.

The judgment is reversed, with directions for proceedings consistent with this opinion.

WENDLER v. RED WING GAS & ELECTRIC CO.

Minnesota Supreme Court — May 6, 1904.

92 Minn. 122, 99 N. W. 625.

INSTRUCTION TO EMPLOYEE — PROPER ELECTRICAL APPLIANCES — EVIDENCE. — 1. The doctrine that the master is not in law bound to instruct an employee as to special dangers incident to the employment if such information is fully within his knowledge, reaffirmed.

2. Certain evidence adduced at the trial fails to show *prima facie* that an injury was inflicted upon appellant by the negligence of respondent in failing to furnish and maintain proper electrical appliances in conducting its electric light plant, or from failing to keep the same in a safe condition.

(Syllabus by the Court.)

Verdict for defendant. Appeal by plaintiff from order denying new trial. *Affirmed.*

C. D. & Thos. D. O'Brien, for appellant.

[redacted]

age he constructed a steam engine without assistance, which worked perfectly; but his knowledge of electrical appliances and electricity at the time of his employment was slight. A short time prior to his regular employment he had assisted in setting the wire running from the dynamo of the plant to the switch board, and during three or four nights prior to January 2d worked with his predecessor for the purpose of familiarizing himself with the duties of such employment. His sole duty, aside from that of watchman, and reporting any difficulty arising in the running of the machinery, was at midnight to pull two copper plugs from the face of the switch board. These plugs, when inserted in the cylinders, formed a perfect connection between the dynamo and the electric system established in the city, and their removal broke the continuous current. It seems the pulling of these copper wires or plugs a distance of two or three inches from the face of the switch board disconnected the dynamo from the city's system, but still left the wires connected with the dynamo of the plant, while a complete removal of the plugs from the cylinders operated to disconnect the same from the dynamo. Each plug, including its handle, consisted of a large copper wire inserted at one end in a larger metallic substance, which in turn was encased in a heavy vulcanized rubber handle. The original exhibits were produced upon the argument. The handles were perfectly smooth, not fused or charred in the least. A circular hand shield approximately four inches in diameter, somewhat akin to a sword hilt, was constructed back of and formed a continuous part of each handle. While working with his predecessor, the appellant at midnight observed him take these plugs by the handles, one at a time, pull them out, and place them in a receptacle adjacent to the switch board, points downward, and was instructed that this was his chief duty. From January 2 until February 7, 1903, he followed these instructions strictly. On the night of February 7th, for some unexplained reason, appellant at the usual time, instead of entirely removing them from the cylinder, pulled the plugs in question two and one-half or three inches from the switch board, without injury. At seven o'clock the next morning he testifies that he noticed them protruding from the switch board, and as he was about to quit work for the night took hold of the two handles at *the same time, and* before succeeding *in pulling them received through his hands,*

arms, and body a terrific shock of electricity. The current upon the wires at the time was an alternating one of 2,100 volts. The electric current burned his hands, wrists, and elbows upon the inner surface and armpits so seriously as to require amputation of both arms below the elbow. The burns upon the left hand, approximately the size of this copper wire, extended diagonally across three fingers upon the inner surface; and the burn upon the other hand was of a like description, except that it extended only from the first joint of the little finger diagonally across it to the end. One of the plugs was found upon the floor by assistants, who immediately responded to the outcries of appellant, and the other remained in its socket upon the switch board at approximately the height of a man's head. A number of witnesses testified that the odor of burning flesh was distinctly noticeable immediately after the accident, and that the exposed portions of the wire forming a part of the plugs were partially covered with what appeared to be freshly burned flesh. This applied to the one still hanging from the switch board as well as to the one which had been pulled completely out and was lying on the floor. Appellant accounts for the burns upon his hands by explaining that in writhing in agony upon the floor he may have incidentally come in contract with the redhot surface of the wire, and that his elbow must have been burned while he was clinging to the handles before he fell, by coming in contact with a metallic substance which protrudes about two inches from the switch board a short distance below the place for inserting the plugs referred to. He insists that he did not touch the wire, and felt safe in grasping the rubber handles only because he was informed that they were insulated, and absolutely nonconductors of electricity. While it appears, as heretofore stated, that appellant assisted in stringing the wires from the dynamo to the switch board, still he testified that he thought the connection from the dynamo was at the end of the cylinder, instead of further forward at a point immediately behind the switch board. It does, however, fairly appear elsewhere in his evidence, and was expressly admitted by his counsel in argument, that he knew the grasping of the wires in question was dangerous, and calculated to transmit a serious electric shock. It is claimed — and one expert called on behalf of appellant testified — *that* electricity might possibly be conveyed over the handles

by a sufficient accumulation of dust, provided this dust coating was continuous from the wire over and around the shield and along the surface of the handle. It appears the handles were partially removed at midnight, and no evidence whatever was introduced affirmatively showing the accumulation of dust or other conductors thereon, but that dust might accumulate from a coal bin situated approximately fifty or sixty feet away, between which and the switch board one room and two partitions intervened. An inspection of the handles, which were produced, does not show an accumulation of dust or other substances thereon. Two witnesses testified that they pulled two like plugs from the same cylinders under the same conditions as to voltage and otherwise without receiving any shock whatever. It also appears that heat is not generated in a wire by the passage of an electric current, unless the current is checked by contact with some substance like flesh. It is argued that, as the rubber handles were not burned, it is apparent that electricity did not pass over or through them, and was, therefore, not checked at the handles by contact with the hands of appellant. It is also argued that the theory of appellant is conclusively overthrown because of the burned flesh which was found upon the wire remaining in the switch board; also that the burned surface at the elbow and armpit could not be accounted for upon the theory advanced by appellant, for the reason that both burns were upon the inner surface of the arm and armpit, which could not by any possibility be brought in contact with the metallic surface referred to. Respondent explains this in the record as follows: That the tremendous electric current received from the inner surface of the fingers followed the bone of the hand to a point of its breakage at the wrist, where heat was thrown off, because the current was checked in its transmission along the continuous bone; that the current for the same reason was again in part checked at the elbow and at the armpit, which accounts for the burns at the places indicated. It is urged that, as the contact occurred on the inner surface of the hand, the electricity would naturally seek, and in the greatest quantities be transmitted, along the inner surface of the bones of the arm. Appellant alleged in his complaint that at the time of the accident complained of he grasped said plugs by the rubber handles for the purpose of extracting them, and in this position received the

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[illegible]

[illegible] receiv[illegible] hand [illegible] of the fa[illegible] instruct[illegible] such hand[illegible] conductors [illegible] the injury!

The learned trial court found the evidence conclusively sho[illegible]

the handles is concerned, whether the connection was made at the back or front of the cylinder. Had the gravamen of the charge in the complaint been, and the evidence established, that appellant seized the wires instead of the handles, without knowledge of danger, and without contributory negligence on his part, with only the meager instructions given him by his master, a much more serious question involving the negligence of the respondent in failing to fully instruct the appellant as to the exact point where the connection with the dynamo was made, and the effect of contact with the wires, would be presented. These features, however, must be eliminated, as they are not in issue. It is inferable from the evidence, and appellant frankly admits by his counsel, that he knew it was dangerous to handle the wires, and testified that the injury was inflicted by contact with the handles. It is clear respondent was not in law required to give him instructions as to any matter fully within his knowledge. *Trundle v. North Star Woolen Mills,* 57 Minn. 52, 58 N. W. 832. The nature of the burns upon appellant's hands, the failure to show any accumulation of dust or other foul matter upon the handles which could transmit an electric current over them, as well as the fact that it was apparently impossible for such an accumulation to exist in view of the nature of the handles and the shape of the hand shields, and the further fact that the rubber forming a part of such handles and shields was not fused, taking also into consideration the evidence that like handles did not, under identical conditions, transmit electricity, is convincing that the current of electricity causing the grave injury complained of was not transmitted over or through such handles. This conclusion is strongly re-enforced by the evidence of a number of witnesses to the effect that immediately after the injury the wires attached to each of the handles were partially covered with freshly burned flesh, which accumulation is now apparent thereon. It is perfectly clear that, after appellant had fallen to the floor, the burned flesh could not be placed upon the wire by its coming in contact with his right hand, as this plug, immediately after the injury, was found hanging suspended from its socket, about five feet above the floor. It also appears appellant was in an agitated frame of mind on the night in question (a discussion of the details of which seems unnecessary); *that for the first time during*

his employment he at midnight, contrary to a custom which he had always followed, and against his instructions, partially pulled the plugs from the cylinders, and left them suspended in such a manner as to make it possible for him to grasp the wire instead of the handles.

Upon a careful examination of the record we are of the opinion that it conclusively appears this injury was not caused, as alleged, by the transmission of electricity through or over the rubber handles, nor by any act or omission on the part of the defendant.

Order affirmed.

KEENE SYNDICATE v. WICHITA GAS, ELECTRIC LIGHT & POWER CO.

Kansas Supreme Court — May 7, 1904.

69 Kan. 284, 76 Pac. 834.

LEASE RESTRAINING COMPETITION BETWEEN RIVAL ELECTRIC COMPANIES — PUBLIC POLICY. — A corporation, engaged in the business of generating and furnishing electricity for public and private use, leased to a rival corporation in the city, for a period of ten years, machinery and appliances used in generating electricity, obligating itself by the provisions of said lease not to engage in the business of furnishing electric light and power to public or private consumers in the city during said period, and not to dispose of any of its property, machinery, or appliances retained by it for producing or generating in said city electric light and power. *Held*, in an action on said lease to recover rents from the lessee, that the lease is in contravention of public policy, and that no action to recover rents can be maintained thereon by the lessor or its assignee.

[redacted]

of business at the city of Wichita. By the terms of the contract or lease the former leased to the latter for a period of ten years, at an annual rental of $3,000, payable semi-annually, certain machinery and appliances, in the city of Wichita, adapted to and used by the lessor for the purpose of generating electricity for light, heat, and power. On the 20th day of March, 1900, the Keene Syndicate, a corporation, purchased of the lessor, the Wichita Electric Railway & Light Company, the property included in and covered by said lease, and also its interest in said lease, taking a written assignment thereof. The lessee, the Wichita Gas, Electric Light & Power Company, being in default of three years' rent in August, 1900, the Keene Syndicate, as assignee of the Wichita Electric Railway & Light Company, commenced its action in the District Court of Sedgwick county to recover the rent, the amount claimed due it from the lessee. The petition of plaintiff presented seven causes of action, and attached thereto was a copy of the said written contract or lease. The first six causes of action were each a specific claim for recovery upon one of the semi-annual payments of rent. Each cause of action made reference to said contract or lease, and made it a part thereof. The seventh and last cause of action in the petition was by plaintiff intended to state a claim for recovery of defendant upon a *quantum meruit* for the use of the machinery delivered to defendant under the lease, and by defendant received and used. This last or seventh cause of action made reference to the preceding causes of action, adopted portions of each, and made them a part thereof, which adoption had the effect to include also in the seventh cause of action the contract or lease attached to and made a part of the petition. The seventh cause of action became thereby also an action for recovery on the contract or lease, and not a cause of action for recovery on a *quantum meruit,* as was contemplated by plaintiff. Defendant filed a demurrer to the petition, which was sustained by the court. Plaintiff elected to stand upon its petition, and judgment was entered against it for costs. Plaintiff brings error.

Does the petition on its face disclose a cause of action — a right of plaintiff to recover from defendant? It is charged by defendant that the petition discloses the contract or lease sued upon to be against public policy and void. The District Court

found the contract sued upon to be void for that reason. Whether or not the petition on its face disclosed the contract or lease to be against public policy and void is the only question before us for our determination. The petition of plaintiff, by its averments, in addition to embodying the facts above stated with reference to location, corporate existence, the execution of the lease, the leasing of the machinery for the term and consideration mentioned, and the assigning of the lease by the lessor to plaintiff, may fairly be said to also disclose, by its averments, that the lessor and the lessee, at the time the lease was entered into, were rival public utility corporations, in the city of Wichita, engaged in generating and furnishing electricity for public and private use for light, heat, and power. The petition also, in substance, avers that the assignor of plaintiff, the Wichita Electric Railway & Light Company, had delivered to defendant all the property described in the lease, under and by virtue of said lease, and had duly performed all the conditions, agreements, and stipulations in said lease to be by it performed. The contract or lease, attached to and made a part of the petition, and upon which the action for recovery is based, contains the following language: "The said first party hereby binds and obligates itself not to engage in the business of furnishing electric light and power to private or public consumers within the city of Wichita, during the period covered by this agreement, except for the purpose of operating the street railway now owned by the first party, and said first party furthermore agrees not to dispose of any of the apparatus, machinery, appliances, etc., retained by it, for producing or generating electric light and power in said city of Wichita." The above language quoted from the contract or lease, applied to and construed with the averments of the petition of which the contract or lease formed a part, fairly discloses that the lessor obligated itself not to engage in the business of furnishing electric light and power to private and public consumers within the city of Wichita during the period of ten years covered by the lease, and further agreed that during said period of ten years it would not dispose of any of its machinery or appliances, retained by it, for the purpose of being used to generate electric light and power in the city of Wichita. The effect of which, if carried out, would be that the lessor, for said period of ten years, would abandon

the exercise of its corporate power to generate and furnish electric light and power for public and private use in the city of Wichita, withdraw itself from the field of competition with the lessor, its former competitor in the business, for said period of ten years, and refrain from the sale of property to others who might thereby become competitors of the lessor in the said field of competition during said period of ten years. But it is not necessary, for the determination of this case, to inquire whether the effect of the agreement between the lessor and the lessee was in fact detrimental to the city of Wichita or its citizens. The inquiry should be, and the true rule is, that agreements which, in their necessary or contemplated operation upon the actions of the parties to them, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public or of third parties, are against the principles of sound public policy, and consequently void. *Atcheson v. Mallon,* 43 N. Y. 147, 3 Am. Rep. 678.

In *Western Wooden-Ware Ass'n v. Starkey,* 84 Mich. 76, 47 N. W. 604, 11 L. R. A. 503, 22 Am. St. Rep. 686, an action to enjoin the association from engaging in a certain business, and from using certain premises in carrying on said business, in violation of a contract with plaintiff, which contract provided that the association would not engage in or carry on the business in controversy for a period of five years, and would not within said period use the said premises or sell them, or permit them to be sold or used, without the consent of plaintiff, the court denied the injunction, and held the contract void as against public policy. Referring more particularly to that feature of the case wherein the association had contracted not to use or permit the premises to be used, nor sell the premises for use, in competition with plaintiff, an element in that case not unlike one of the elements in the case at bar, Mr. Justice Long, speaking for the court, said: "In the present case the defendants were not only to remain out of such business for the full time specified, but the premises which had been used to carry on the manufacturing by them, though not sold and conveyed under the contract, could not be again used for such time by them or any other party for the same business. I do not think it needs the citation of authorities to show that contracts of this nature have frequently been condemned

by the courts and held void as unreasonable restraints of trade, and therefore void on the ground of public policy." Among the contracts declared illegal under the common law because opposed to public policy, were contracts in general restraint of trade, and contracts between individuals to prevent competition and keep up the price of articles of utility.

It is well settled that in the law of contracts the first purpose of the court is to look to the welfare of the public, and, if the enforcement of the agreement would be detrimental to its interest, no relief should be granted to the party injured, and that even though it might result beneficially to one of the parties who made and violated the agreement. In *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979, the court said:

> "Courts decline to enforce contracts which impose a restraint, though only partial, upon business of such character that restraint to any extent will be prejudicial to the public interest."

The rule that contracts and agreements, when contrary to public policy, will not be enforced, is one of the great preservatives of a State. It has been the uniform rule of this court, and indeed of all courts, to hold that contracts tainted with illegality are absolutely void. *Hawley v. Coal Co.*, 48 Kan. 593, 30 Pac. 14; *Hinnen v. Newman*, 35 Kan. 709, 12 Pac. 144. Plaintiff, the assignee of the lessor, the Wichita Electric Railway & Light Company, is in no better position to recover than the lessor, as the illegal consideration appears upon the face of the contract or lease. *Bank v. King*, 44 N. Y. 87; *Setter v. Alvey*, 15 Kan. 157. Whether plaintiff could maintain an action against defendant on a *quantum meruit* or otherwise, independently of the contract, need not be here considered. That question, in the view we have taken of the seventh cause of action of the petition, is not in the record before us. The contract or lease sued upon being in contravention of public policy, no action for a recovery upon it can be maintained.

The judgment of the District Court will be affirmed. All the justices concurring.

BERNIER v. ST. PAUL GASLIGHT CO.

Minnesota Supreme Court — May 20, 1904.

92 Minn. 214, 99 N. W. 778.

INJURY FROM ELECTRIC WIRE WHILE PAINTING POLE — ASSUMPTION OF RISK — CONTRIBUTORY NEGLIGENCE — EXPERT EVIDENCE — DAMAGES. — This is an action to recover for personal injuries sustained by the plaintiff by reason of the negligence of the defendant in failing to keep certain electric wires properly insulated near which the plaintiff was required to work. *Held* that

1. The question of the plaintiff's assumption of the risk, and his alleged contributory negligence, were, under the evidence, for the jury.
2. Expert evidence as to how long before the plaintiff's injury the defect in the insulation of the wires occurred was admissible.
3. An award of $3,250 for the loss of the entire thumb of plaintiff's left hand and the loss of the index finger of his right hand was not excessive.

(Syllabus by the Court.)

Appeal by defendant from a judgment for plaintiff. *Affirmed.*

Samuel A. Anderson (*Mart M. Monaghan,* for counsel), for respondent.

George W. Buffington (*Frederick V. Brown,* of counsel), for appellant.

Opinion by START, C. J.:

On June 12, 1903, the plaintiff, a minor twenty years old, was in the employ of the defendant, and while painting one of its poles, upon the cross-arms of which electric wires were strung, he received an electric shock which resulted in the loss of the index finger on his right hand and the whole of his thumb on his left hand. He brought this action to recover damages for his injury, which he claims was caused by the defendant's negligence. The specific acts of negligence charged in the complaint are that two of the wires which were heavily charged with electricity, between which the plaintiff was obliged to go and be in painting from the top of the pole to a point below the wires, were too close together for safety; that the defendant negligently permitted the wires near the place where it was necessary for the plaintiff to be while doing his work to become bare of insulation, and so exposed that

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Expert Evidence. — See *Citizens Telephone Co. v. Thomas, post,* and note thereunder.

any person touching the wires at the exposed places would receive a heavy shock of electricity; and, further, that the defendant neglected to instruct and warn the plaintiff of the dangerous character of the place in which he was required to work. The complaint further alleged, in effect, that the plaintiff, while lowering himself with due care between the two wires for the proper execution of the work he was required to do, received a shock from the wires by reason of their defective insulation and their close proximity to each other; that to save himself from falling he involuntarily grasped the wires, and thereby received the injury complained of. The answer, so far as here material, was a general denial. The trial of the action resulted in a verdict for the plaintiff for $3,250, and the defendant appealed from an order denying its blended motion for judgment notwithstanding the verdict, or for a new trial.

The evidence fairly sustains the finding of the jury to the effect that the defendant was guilty of negligence in the premises, which was the direct cause of the plaintiff's injury. No claim to the contrary is made on this appeal, but it is earnestly contended by the defendant that the plaintiff must be held, as a matter of law, to have assumed the risk of injury to himself while working at the place assigned to him. The rule as to the assumption of risks by an employee is so definitely settled by the decisions of this court that it is only necessary to briefly state it. It is this: If the instrumentalities or the place for the performance of the servant's duties are defective or unsafe, and the servant not only knows this, but also knows, understands, and appreciates, or ought in the exercise of ordinary prudence to understand and appreciate, the risks to which such defect or unsafe place expose him, he assumes the risks incident to the use of such defective instrumentalities or unsafe place. *Blom v. Park Association,* 86 Minn. 237, 90 N. W. 397. The servant, however, does not assume the risks arising out of the negligence of the master, and, in the absence of notice, actual or constructive, to the contrary, the servant has a right to presume that the master has discharged his duty as to providing safe instrumentalities and place for the work. *Delude v. Ry. Co.,* 55 Minn. 63, 56 N. W. 461.

If we accept, as we must for the purpose of this appeal, the most favorable view for the plaintiff, of the evidence relevant

to this question of the assumption of risks, the following facts were established: The plaintiff was a minor twenty years old at the time he was injured, and had then been in the service of the defendant for about one month. His work was painting the defendant's electric light poles. For some four years prior to his employment by the defendant he worked for a telephone company, erecting poles, putting up cross-arms, and stringing new wires. He had also worked for one month in the shop of an electric signmaker. He knew that the defendant had an electric department, and that its wires were for the purpose of conveying electricity, but he did not fully understand the danger of working in close proximity to live wires. He had never before worked around or among live wires. He was not instructed or warned as to the condition of the wires among which he was to work, except that some time before the accident the foreman of the defendant told him that on some poles the plaintiff was then about to paint there were some wires which were charged, but that he would send a crew to change the wires and place them out on the cross-arms away from the poles, so that the plaintiff could go on with his work. The wires were so placed out from the poles. At the time the plaintiff was injured he climbed, with the aid of climbers or spurs, to the top of the pole, which had three cross-arms upon which wires were strung. In doing so he passed safely between the two wires in question, and began painting the pole at the top, and worked downward. When he got down to the third arm and between the wires, it was necessary to change his safety belt. While in this position, and so occupied, he received a shock, and, in attempting to take hold of the cross-arm to prevent his falling, his hands came in contact with a portion of the wires, whereby he received the injuries stated in his complaint. He became unconscious, and on recovering his senses he discovered that a strip from four to six inches in length of the insulation on each wire was gone. Upon the whole evidence bearing upon the question of the plaintiff's assumption of the risks, we are clearly of the opinion that, in view of his age, experience, and all the facts disclosed by the evidence, the question was one of fact for the jury.

Counsel for the defendant cites and relies upon the case of *Anderson v. Nelson Lumber Co.*, 67 Minn. 79, 69 N. W. 630, in support of his claim *that the plaintiff in this case* assumed

the risk. In that case the instrumentality was an unguarded circular saw making some three or four thousand revolutions per minute, and the operator who was injured by the saw was a man twenty-two years old, who had had three or four years' experience as a sawyer, and was familiar with machinery. It was held as a matter of law, upon the facts stated, that the dangers were obvious, and that the plaintiff must have known and appreciated the risks. The facts in the case cited are so radically different from the facts in the one here under consideration that it is not in point.

The question of the plaintiff's contributory negligence in this case was also a question for the jury. The plaintiff offered the testimony of a competent witness, who examined the defective wires in question forty-eight hours after the plaintiff's injury, and he was permitted to testify, over the defendant's objection, that the wires were not insulated at a point near the pole on the third cross-arm; and, further, gave his opinion that the wires had been in that condition for some months. The ruling of the trial court in receiving this evidence is assigned as error. The first reason urged in support of this claim of error is that the testimony related to a period of time too remote from the accident, and, further, that the probable length of time the wires had been bare of insulation was not a proper question for expert evidence. The plaintiff testified that he noticed the absence of insulation on the wires immediately after he was injured, and it became important, as bearing on the question of the defendant's negligence, to give evidence tending to show how long this defect

he has the ability to succeed in some profession or business not involving manual labor, it will be years before he can qualify himself for the change; and if, perchance, he is successful in such new field of labor, it will not restore his disfigured and crippled hands to their original strength and shapeliness. We are of the opinion that the damages awarded by the jury are not excessive, but only fairly compensatory.

Order affirmed.

MEMPHIS CONSOL. GAS & ELECTRIC CO v. SPEERS.

Tennessee Supreme Court — May 23, 1904.

113 Tenn. 83, 81 S. W. 595.

LIABILITY OF ELECTRIC COMPANY — CONTROL OF WIRES — SIGN — DEATH OF HORSE. — An electric company, furnishing electric current for illuminating a sign, and having no interest in, or control over the wires or appliances connected with the sign, is not liable for the death of a horse hitched to the sign post by means of a steel chain and receiving a deadly shock therefrom.

Error by defendant from judgment for plaintiff. *Reversed.*

Wright, Peters & Wright, for plaintiff in error.

Caruthers Ewing, for defendant in error.

Opinion by BEARD, C. J.:

The evidence in this case tends very strongly to show that the horse of defendant in error was killed by an electric shock, while standing hitched to a post in front of the business house of one Roberts in Memphis. This post supported an illuminated sign, used by Roberts to advertise his business. The sign was lighted by electricity, which passed to it through wires which were incased in a lead pipe. These wires were an extension of those in Roberts' house.

In hitching, the defendant in error threw a small steel chain around the post and fastened its two ends to the bit in the horse's mouth. This chain came in contact with a metal clamp, the purpose of which was to support and fasten the lead pipe to this post. The testimony tended also to show that through some defect

in construction, or from a lack of perfect insulation, of these wires, electricity escaped from them, and was communicated to the horse, through the chain which held him, in sufficient quantity to cause his death. The contention of the plaintiff in error was that, even if this were true, yet it was in no way responsible. To make good this contention, it offered testimony to show that all the wiring about the premises of Roberts was done under his order; that the wires were his property and under his exclusive control; that under an ordinance of the city of Memphis it made a connection with these wires only after an inspection of them by the electrician and the board of underwriters of the city of Memphis, and a certificate from both that they were in good condition to receive the current; and that the sole relation which it had to these wires was to furnish the electricity and receive payment for it. This testimony was excluded by the trial judge, and when he came to charge the jury he said to them, in substance, that, if they found that the horse was killed by electricity furnished to Roberts by plaintiff in error over a defective wire, then they should find for plaintiff.

In both respects there was error. If it be true that the facts were as this rejected testimony indicated, we cannot conceive of any rule of law, which holds the gas and electric company liable for this loss. It is true that electricity is a subtle, and, unless controlled, a dangerous, agent; yet we do not see how this fact fixes responsibility on this company, when it simply furnished the electric current to the wires of Roberts, over which it had

be searched in vain for a case where a gas company had been held liable under such conditions, or for a sound rule of law which would sanction placing such liability on the company.

We understand that liability for an injury occasioned through such a defect depends upon the interest in or control over the appliance in which the defect exists, and if there is neither interest nor control, there would be none. In the illustrations given, while it is the gas which inflicts the injury, yet it would have been harmless, save for the defect in the pipes, which were the property of and exclusively under the dominion of the owner of the house in which they were located; and this must be equally true as to an electric company furnishing its product under like circumstances. We can perceive no reason for a distinction between the two cases, and no principle upon which either could be held liable for injuries sustained by an escape of the destructive agency of its creation, without fault or negligence on its part.

The circuit judge, in excluding the testimony as to the ownership and control of the defective wires by another than the plaintiff in error, as well as in his charge, was controlled by the case of *Maysville Gas Co. v. Thomas' Adm'r* (Ky), 75 S. W. 1129. While the opinions of that court are entitled to the highest respect, yet we are not able to coincide with its reasoning in that case. The sounder view, we think, is that of the Court of Appeals of Colorado, as expressed in *National Fire Ins. Co. v. Denver Gas & Electric Co.*, 7 Am. Electl. Cas. 715, 63 Pac. 949.

In each of these cases, the company furnishing the electric current had no interest in or dominion over the wires, the defect in which permitted the current to escape, so as to inflict the injury complained of. In the Kentucky case the court rested its conclusion upon the dangerous nature of the agency supplied. "Considering," said the court "the dangerous character of the force produced by the gas company, there was a duty imposed on each [that is, the furnisher and receiver] to see that the wires into which it was sent were properly insulated. The danger was exactly the same, whether the wire was owned by one or both of these corporations."

Pressed to its legitimate conclusion, we think this argument would make an electric or a gas company an insurer *against defects* in appliances over *which they had no control, and, to avoid lia-*

bility, would impose upon them the duty of continued inspection of the wires and pipes of every customer supplied with their products. This would be a burden which no such company could bear and live; and it also would be a source of annoyance to its customers, which they would not long submit to.

We prefer to place this court in line with that of Colorado, which holds that there is no liability when there is no control over the wires and no knowledge of the defect which was the occasion of the injury.

Judgment reversed, and cause remanded.

FISH v. KIRLIN GRAY ELECTRIC CO.

South Dakota Supreme Court — June 8, 1904.

18 S. Dak. 122, 99 N. W. 1092.

ELECTRIC COMPANY — DUTY TO REPAIR LIGHTS — INJURY TO THIRD PERSON. — An electric company, under a contract to furnish the appliances and properly and safely suspend and hang an arc light in a church, and to keep said light and appliances in a good and safe condition and repair, is liable for damages for the death of a party attending the church where by reason of its failure to repair said light, after notice, it fell and injured said party.

Appeal by defendant from judgment for plaintiff. *Affirmed.*

Wilbur S. Glass for appellant.

George W. Case for respondent.

her while attending church in the city of Watertown by the falling of an electric arc light lamp suspended from the ceiling. Verdict and judgment were in favor of the plaintiff, and from the order denying a new trial the defendant has appealed.

A demurrer to the complaint was interposed, which was overruled by the court, and its ruling thereon is assigned as error, and will be first considered. The plaintiff, in her complaint, alleges, in substance, that the defendant is a corporation engaged in the business of furnishing electricity for electrical lights to be used in dwelling houses, churches, etc., in the city of Watertown; that prior to the injury alleged in the complaint the defendant entered into a contract with the trustees of the Methodist Church to furnish the appliances and properly and safely suspend and hang a certain arc light in said church, and it was further agreed by the said defendant to keep the said light and the appliances incident thereto in a good and safe condition and repair, and to furnish the necessary carbons therefor; that under and by virtue of the said contract and agreement it became and was the duty of the said defendant to not only properly suspend said arc light to be used in the lighting of the said church, but it became and was its duty to keep the said light and all the appliances incident thereto in a good and safe condition and repair; that the trustees of the said church paid the defendant for said care and attention to said light, and relied upon it to comply with the agreement and keep and maintain the light in a good and safe condition; that prior to the injury set forth the said light became out of repair, unsafe, and insufficient for the purpose for which it was to be used, of which the defendant company was notified a short time prior to the injury complained of, and the said company was requested to make the necessary repairs; that one of the defendant's servants pretended to repair the said light, but negligently and carelessly failed and neglected to properly repair the same; that on or about the 2d day of June, 1901, while the plaintiff was attending services in the said church, and without any knowledge on her part of the unsafe, insecure, or dangerous condition of the said light or of its appliances, and without any negligence on her part, and while sitting under the said light, by reason of the negligence of the said *defendant the* arc fell upon her *without any warning, thereby painfully* and *severely injuring her.*

It is contended by the appellant, among other things, that the complaint is insufficient for the reason that it is not alleged that the defendant was the owner of the church or the owner of the arc light which caused the injury. We are of the opinion that the contention of the appellant is untenable. It will be noticed that it is alleged in the complaint that the defendant agreed with the church authorities to hang and care for the said light, furnish it with carbons, keep it in order, and supply it with the necessary electricity to produce the required light, for a consideration paid by the said church authorities. Notwithstanding the church and the arc light were owned by the church society, the electricity, as we have seen, was furnished by the defendant, and the hanging, care, and custody of the light were under the control and management of the defendant. For reasons more fully hereinafter stated, we are of the opinion that the court ruled correctly in overruling the demurrer to the complaint.

On the trial it was shown that the defendant originally furnished the arc light, and superintended the hanging of the same, but that a year or more prior to the injury complained of the light and the machinery in connection therewith in the church became the property of the church. It was also shown that under the contract between the authorities and the defendant the defendant agreed to furnish the required electricity for said light, and also agreed to keep the said light and the machinery connected therewith in good order, furnish carbons, etc. It was further shown that prior to the injury complained of the light worked

chinery is only answerable to his employers for want of care or skill in the execution thereof, and he is not liable to third parties for accidents or injuries which may occur after the completion and delivery of the machinery, as laid down in *Losee v. Clute et al.*, 51 N. Y. 494, 10 Am. Rep. 638, and *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 513. In the former case an action was instituted for damages resulting from injuries caused by the explosion of a steam boiler against the party who manufactured the same. The Court of Appeals of New York held that the action could not be maintained, for the reason that the boiler had been manufactured and delivered to the party operating it, and the defendant was not, therefore, liable to the party injured. It will be observed in that case that the steam boiler had been delivered and accepted by the party who was operating the same, and that the person injured was a third party having no connection with the defendant, and to whom the defendant owed no duty. In that case the court says:

"They contracted with the company, and it did what was done by them for it and to its satisfaction, and when the boiler was accepted they ceased to have any further control over it or its management, and all responsibility for what was done with it devolved upon the company and those having charge of it, and the case falls within the principle decided by the Court of Appeals in *The Mayor, etc., of Albany v. Cunliff*, 2 N. Y. 165, which is that the mere architect or builder of a work is answerable only to his employer for any want of care or skill in the execution thereof, and he is not liable for accidents or injuries which may occur after the execution of the work."

We are of the opinion that the principle established by the cases which we have just cited is not applicable to the case at bar. In the case before us the defendant not only furnished and suspended the electric arc light, but it had agreed to keep the same in good repair, to supply the necessary carbons and electricity necessary for its proper use. The defendant, with full knowledge of the dangerous character of the force it supplied, was bound to use the same with a care commensurate with the danger of its employment; and if the injury, as found by the jury, was caused by the defendant's negligence in its care and management of the light, it is liable to the plaintiff for the injuries sustained. As we have seen, the defendant's duty did not cease upon suspending the arc light and its acceptance by the church trustees, but continued by reason of its agreement to furnish carbons, and to keep the light in good repair, and to supply the electricity required

for the same. The case of *Thomas, Administrator, v. Maysville Gas Co.* (Ky.), 7 Am. Electl. Cas. 588, 56 S. W. 153, 53 L. R. A. 147, establishes the principle which, in our opinion, should control in this case. In that case it was held:

"A corporation which generates and sends electricity into the wires of a street railway company is chargeable with the duty to see that such wires are properly insulated, and it, as well as the street railway company, is liable for failure to perform that duty, if a person is killed because the wires are not properly insulated."

In that case the street railway company operated an electric car line, and the defendant gas company was engaged in the business of furnishing gas and electricity. The defendant, under a contract with the street railway company, supplied the electricity necessary for operating the car line, but the defendant had no interest in the railway company. The railway company not only operated its own road, but owned the wires through which the electricity passed. A third party came into contact with one of the wires by reason of its want of insulation, and was thereby killed. His administrator brought the action against not only the railway company, but also the gas company that furnished the electricity. A judgment having been directed in favor of the gas company, the plaintiff took an appeal. Judgment was also rendered against the street railway company, from which no appeal seems to have been taken. The question, as stated by the Supreme Court, is, was the defendant gas company responsible for the death of the plaintiff's intestate, if such death was the result of negligence of the said company in failing to keep the wires charged by the gas company with electricity properly insulated? The court held the gas company liable, and reversed the ruling of the lower court in directing a verdict in favor of that company. It does not appear from the statement of facts in that case that the gas company was under any contract to keep the wires in proper condition, but the court held, notwithstanding that fact, that it was its duty to see that they were properly insulated, and that the public were properly protected from the dangerous element furnished by the company. The case at bar, as will have been observed, presents some stronger elements against the defendant than was shown in that case. In the case at bar the defendant not only furnished the electricity necessary for operating the arc light, but it obligated itself to keep the same in repair and

in good order. Clearly, under such a contract, it was liable for any injury resulting from its negligence in suspending, care, and management of such light. The case of *Excelsior Light Company v. Sweet*, 57 N. J. Law, 224, 30 Atl. 553, is somewhat analogous to the case at bar. It was an action against an electric light company for damages for injuries resulting from the fall of one of its lamps suspended in a street of the city, caused by the negligence of the defendant. In that case the electric light company owned the wire and the electric light lamp, and furnished the electricity for lighting the same. The court affirmed the judgment of the court below holding the electric light company responsible for its negligence in causing the injury to plaintiff, who was injured by the fall of the lamp while passing along the street under the same. Of course, the fact that the electric light company owned the arc light as well as operated the same had some influence upon the decision of the appellate court. But it would seem that the court would have taken a similar view had it been shown that the city owned the electric light lamp, and that the electric light company was under a contract to keep it in good order and furnish carbons and electricity necessary for lighting the same. As was stated in *Thomas, Administrator, v. Maysville Gas Company, supra*, the question presented here is a new one, upon which no decisions have heretofore been made. But we are of the opinion that, where an electric light company not only furnishes the electricity, but contracts to furnish the carbons and keep the light in proper repair and order, such company is liable for injuries caused by the negligence in the suspension and management of such light. As before stated, electricity is an exceedingly dangerous element, and must necessarily be under the control of persons who are familiar with the management of electrical machinery and appliances.

Neither the church authorities nor persons in attendance upon church services were presumed to know whether the electrical lamp was in order or properly suspended. But it was the duty of the company to know and see that the lamp was so properly suspended, and kept in good working order. It is true that in this case the cause of the falling of the electric lamp was not distinctly shown, but there was evidence tending to prove that the upper part of the lamp became overheated, and that the small

cotton cord by which the same was suspended was burned off or charred so that it became so weakened that it was not able to sustain the lamp suspended by it, and we think that the jury was fully warranted in finding such to be the fact from the evidence introduced, as it evidently did. That the lamp was out of order and working badly immediately prior to its fall was clearly shown. As we have seen, the company was notified that the lamp was out of order and was working badly, and that it attempted to repair the same by sending an experienced workman to make such repair. That he failed to remedy the difficulty is also shown by the evidence. In our opinion, the evidence was amply sufficient to justify the verdict of the jury, and the motion for a new trial was properly denied.

The order denying a new trial is affirmed.

RICHMOND & P. ELECTRIC RY. CO. v. RUBIN.

Virginia Supreme Court of Appeals — June 16, 1904.

3 St. Ry. Rep. 870, 102 Va. 809, 47 S. E. 834.

1. DUE CARE IN MAINTENANCE OF TROLLEY WIRES UNDER TELEPHONE WIRES — QUESTION FOR JURY. — It is for the jury to say whether a street railway company used due care in stringing its wires under the wires of a telephone company when a fire in a store is caused by the telephone wire connecting with the store, causing a contact with the trolley wire strung underneath, or as to whether the breaking was due to a storm so severe as to be an "act of God."

4. CONTRIBUTORY NEGLIGENCE — FAILURE TO ADOPT DEVICE PREVENTIVE OF SUCH ACCIDENTS. — It was not contributory negligence for plaintiff to fail to adopt a device to be attached to telephone wires entering a house, to guard against the admission of an unusual flow of electricity.

Appeal by defendant from judgment for plaintiff in action for damages. *Affirmed.*

William L. Royall, for plaintiff in error.

P. V. Cogbill and *D. L. Pulliam,* for defendant in error.

Opinion by BUCHANAN, J.:

Harry J. Rubin instituted his action of trespass on the case to recover damages for the burning of his stock of goods, alleged to have been caused by the negligence of the Richmond & Petersburg Electric Railway Company. Upon the trial of the cause there was a verdict and judgment for the plaintiff, and to that judgment the railway company obtained this writ of error.

The first error assigned is the action of the trial court in refusing to give the defendant company's instruction numbered 4, which is as follows:

"If the jury believe from the evidence that the fire which consumed plaintiff's store was not caused by defendant's agents moving the poles of the Long Distance Telephone Company of Virginia, or otherwise weakening the wires of the said Long Distance Telephone Company so that one or more of them broke and fell upon the wires of the defendant, and took up and carried from them electricity to plaintiff's store, thereby setting fire to it; and if they further believe from the evidence that when defendant, in constructing its railway line, reached the turnpike where its wires had to intersect with the wires of the Long Distance Telephone Company of Virginia it found the line of the said telephone company properly constructed and with wires as good and as strong as are usually used in the construction of long distance telephone lines in the country; and if they further believe from the evidence that defendant in running its wires under the wires of said Long Distance Telephone Company, placed them far enough from those wires to avoid risk of contact between them by reason of said telephone wires sagging from natural causes — then they are instructed that defendant was under no obligation to erect guard wires or other safeguards between its wires and the wires of said telephone company. And if they further believe from the evidence that the wires of said Long Distance Telephone Company of Virginia were broken by a sleet caused by a storm so violent and extraordinary that the history of climatic variations and other conditions in this region afforded no reasonable warning of it, and that, being thus broken, they fell on the defendant's wires, and took up from them electricity, which they carried to plaintiff's store, and thereby set it on fire, then they are instructed that defendant is not liable for its electricity being so carried to plaintiff's store, and their verdict should

be for defendant, unless the wire broke at a place where defendant's agents cut and mended the same."

By this instruction the court was asked to tell the jury, among other things, that, as a matter of law, the defendant company, in running its wires under the telephone wires, was under no obligations to erect guard wires, or other safeguards, between its wires and the telephone wires, provided the distance between them was sufficient to avoid contact between them by reason of the sagging of the telephone wires, if they believed the telephone line was properly constructed, and its wires as good and as strong as are generally used in the construction of long distance telephone lines in the country. It is true, as insisted by counsel for the defendant company, that in the construction and maintenance of its wires under the telephone wires it was only required to exercise reasonable or ordinary care. But what is reasonable or ordinary care is to be graduated and determined by the danger under all the circumstances of the case. The danger to persons and property from permitting a telephone wire to come into contact with a trolley wire heavily charged with electricity is very great, and the care required to avoid such contact must be commensurate with the danger. 1 Thompson on Negligence (2d ed.), §§ 797, 804; Joyce on Electricity, § 445.

The fact that the defendant company had legislative authority to operate an electric railway did not lessen its duty to exercise a degree of care proportionate to the danger to be avoided. A steam railway company has legislative authority to employ the powerful

"The master's duty to furnish a [illegible] § 195 — and this is well settled law — is not [illegible] to use the ordinary care and diligence [illegible] in the protection of his servants, under circumstances which would [illegible] a [illegible] to the use of great or extreme care. . . . The master is not to provide the very best materials [illegible] be procured; nor those which are absolutely the most [illegible] safe. His duty is discharged by providing those which are [illegible] and fit." *Bertha Zinc Co. v. Martin*, [illegible] *Tarrant's Adm'r v. Cromer's Adm'r*, 99 Va. 763, 40 S. E. 34. See also [illegible] §§ 30–32.

Whether or not the defendant had exercised the proper degree of care in guarding its wires from coming into contact with the telephone wires was a question for the jury, to be determined by all the facts and circumstances of the case, under the instructions of the court. The question of negligence or due care is one peculiarly within the province of the jury, and cannot be established as a matter of law by a state of facts about which reasonably fairminded men may differ. *Carrington v. Ficklin's Exrs.*, 32 Gratt. 670; *Kimball & Fink v. Friend's Admr.*, 95 Va. 140, etc., 27 S. E. Rep. 901.

The question of whether or not the breaking of the telephone wire and its contact with the trolley wire were caused by a storm so extraordinary in its character as to amount to an "act of God," upon which the court was asked to instruct in the latter part of instruction No. 4, was properly submitted to the jury by other instruction given by the court.

The second assignment of error is the giving of instruction "AA" by the court on its own motion. The objection made to it is that it left to the jury to say whether or not, under all the facts and circumstances of the case, the defendant had exercised due care in guarding its wires from contact with the wires of the telephone company. That was a question for the jury, as we have seen in considering the defendant's instruction No. 4, and, as instruction "AA" properly submitted that question to them, there was no error in giving it.

The third error assigned is the refusal of the court to give the defendant's instruction No. 10. By that instruction the court was asked to tell the jury that, if the right of the defendant to erect its wires at the point where they intersected with the telephone line was prior to that of the telephone company, it was under no obligation to put up a guard wire between its wires and the telephone wires, and that, if they further believed that the telephone wires fell upon the wires of the defendant, and took from them electricity which was carried to and destroyed the plaintiff's store, the defendant was not responsible for the fire and loss thus caused, unless the telephone wires broke where the defendant's agents cut and mended the same.

This instruction was properly rejected. It was wholly immaterial to the plaintiff's right of recovery whether the defendant

company or the telephone company had the prior or superior right in erecting their respective wires. It was the duty of both to exercise due care to see that their wires did not come in contact, and, if the defendant failed to do this, it was liable for the consequences of its negligence. 1 Thompson on Negligence, § 805; Joyce on Electricity, § 517.

The refusal of the court to give the defendant's instructions numbered 5, 6, 7, 8, and 9 is assigned as error. Instructions 5, 6, and 7 define the measure of the defendant's duty in guarding against its wires and those of the telephone company coming into contact, and are in conflict with what we have seen, in discussing the defendant's instruction No. 4, is the correct rule on the subject, and were, therefore, properly refused.

By instruction No. 8 the court was asked to tell the jury that the law presumed that the telephone company, in erecting its line, used all the ordinary precautions for making its wires safe, so that they would not cause injury to its clients and customers. The manner in which the telephone line had been constructed was before the jury, and artificial presumptions do not generally come into play where the evidence shows the conditions under which an accident occurs. 1 Thompson on Negligence, § 482. The instruction was properly refused.

By instruction No. 9 the court was asked to instruct the jury that if they believed, from the evidence, that at the time of the accident there was in common use a device to be attached to telephone wires entering houses, which was an effectual guard against the admission of an unusual and dangerous flow of electricity, and that the plaintiff had failed to use such device, then the plaintiff was guilty of contributory negligence, and could not recover.

"As there is a natural presumption that every one will act with due care (in the absence of evidence to the contrary)," say Shearman & Redfield in their work on Negligence, § 92, "it cannot be imputed to the plaintiff as negligence that he did not anticipate culpable negligence on the part of the defendant or a stranger. He has the right to assume that every one else will obey the law (including not only the common law, but also statutes or city ordinances), and to act upon that belief." Ordinarily prudent men would scarcely think it necessary, when they have telephones placed in their houses, to use devices *to prevent their* property

from being destroyed by an unusual and dangerous flow of electricity, transmitted to the telephone wire by the negligence of an electric railway company in allowing its heavily charged wires to come into contact with the telephone wire. Clearly, the failure of the plaintiff to guard against such a contingency was not contributory negligence as a matter of law, as the defendant's instruction made it.

The next assignment of error is to the action of the court in giving its own instruction "BB" and the instructions "A," "B," "C," "D," and "E," asked for by the plaintiff. The objection made to each and all of these instructions is that they made the jury the judges of whether or not the defendant exercised reasonable care in guarding against contact between its wires and those of the telephone company. This was manifestly a question for the jury, for the reasons given in discussing the defendant's instruction No. 4.

In stating his case to the jury, plaintiff's counsel made certain statements as to what he expected to prove, which were objected to by the defendant on the ground that there were no averments in the declaration which authorized such proof. The action of the court in permitting such statement to be made is assigned as error.

There is no merit in this objection, as the averments in the declaration clearly entitled the plaintiff to put in evidence the facts which his counsel stated he expected to prove.

Another assignment of error is to the action of the court in allowing the following question to be asked, upon the ground that it was leading, viz.: "As an expert, state whether or not, if a telephone wire, which was a copper one, had been spliced with an iron wire, would it not have been a defective way to have done it?" When, and under what circumstances, a leading question may be put, is in the discretion of the trial court, and, as a general rule, is a matter which cannot be assigned as error. 1 Greenleaf on Evidence (Redfield's ed.), § 435. But, if it could be, no injury resulted to the defendant in allowing the question to be asked, since the witness had already testified that an iron wire and a copper one would not splice well.

During the examination of a witness, who was put upon the stand by the plaintiff, he was asked if he was not summoned by the defendant. He answered that he did not know. The clerk of

the court was then called upon to see if the witness was not so summoned, whereupon the counsel for the defendant admitted that he was, but afterward moved the court to strike out the admission. The court overruled the motion, and this is assigned as error.

The plaintiff was entitled to have the fact admitted in evidence as tending to show that the defendant thought the witness was worthy of credence by having him summoned, and the court properly refused to strike out the admission.

Another error assigned is the refusal of the court to allow the witness Tucker to answer a question propounded to him as an expert. The witness was asked on one day of the trial whether or not a certain kind of fuse was in common use, and answered that he did not know. On the next day he was put upon the stand, and asked if he had made inquiries about its use, and whether or not he could make any statement in addition to that made on the day before as to the fuse being in general use in February, 1902. The question was objected to, and the court refused to allow it to be answered, upon the ground that the witness's expert knowledge on the subject was not of such a character as to fit him to answer the question.

The court's ruling was plainly right; but, if it were not, the exception could not be considered, since the bill of exceptions does not show what the answer of the witness would have been if he had been permitted to answer. He may have known no more on the subject on that day than he did the day before. A judgment will not be reversed because evidence has been excluded or rejected by the trial court, unless its materiality be made to appear. *Union Central Life Ins. Co. v. Pollard,* 94 Va. 146, 157, 26 S. E. Rep. 421, 36 L. R. A. 271, 64 Am. St. Rep. 715; *Kimball & Fink v. Carter,* 95 Va. 77, 80, 27 S. E. Rep. 823, 38 L. R. A. 570.

The refusal of the court to strike out certain answers of Nunnally and Martin, witnesses for the plaintiff, because the answers were immaterial, is assigned as error. It is unnecessary to decide whether or not the court erred in not excluding the evidence in questions, as it is clear that it could not have affected the verdict of the jury.

The remaining assignment of error is the refusal of the court to set aside the verdict because not warranted by the evidence. There were two theories as to the cause of the fire which destroyed the

plaintiff's goods. One — that of the defendant — was that the storehouse caught on fire from the stove which was in it, and there was some evidence tending to sustain that contention, but the great weight of evidence tended to show that there had been no fire in the store for some hours prior to the accident, and that the building did not catch on fire from that source. The other theory was that the storehouse was set on fire by the telephone wire when it fell upon or came in contact with the defendant's wires. The evidence, which covers more than 200 pages in the printed record sustained that theory, and fully justified the jury in reaching the conclusion they did.

Upon the whole case we are of opinion that there is no error in the record to the prejudice of the plaintiff in error, and that the judgment of the Circuit Court should be affirmed.

PARSONS v. CHARLESTON CONSOL. RY., GAS & ELECTRIC CO. ET AL.

South Carolina Supreme Court — June 25, 1904.

69 S. Car. 305, 48 S. E. 284.

1. TELEPHONE WIRES ACROSS ELECTRIC RAILWAY WIRES — FAILURE TO KEEP ELECTRIC WIRE INSULATED — SUFFICIENCY OF COMPLAINT. — In an action against an electric railway company for death caused by contact with a telephone wire which had fallen across a defectively insulated wire of the defendant, the complaint alleged that the wires of the defendant from which the fatal current was transmitted to the telephone wire were defectively, insufficiently, carelessly, and negligently insulated, and the said defendant, its agents and servants, were well aware of said want of insulation, or could have been aware of the same by the exercise of proper diligence. It was held that the complaint was not demurrable, and that a good cause of action was stated and that it was not necessary to allege actual knowledge of the fallen wire or diligence in discovering it.
2. DEGREE OF CARE. — The rule as to the degree of care in the use of electricity is the same as in the use of steam and other agencies — the care must be proportionate to the danger. In determining the danger it is the duty of those in control to have in view all the surroundings, including the contiguity of other wires, and their liability to fall and come in contact with the dangerously charged wire.

Care Required of Electric Companies. — See *Guest v. Edison Illuminating Co., post,* and note thereunder.

2. SAME. — The failure to adopt all usual appliances and methods to prevent contact and harmful discharge of electric current through other wires is a breach of duty to the public.

Appeal by the Charleston Consolidated Railway, Gas & Electric Company from an order overruling a demurrer. *Affirmed.*

Mordecai & Gadsden, for appellant.

Nathans & Sinkler, for respondent.

Opinion by WOODS, J.:

The plaintiff, administratrix of Edward Parsons, alleges that her intestate's death was caused by coming in contact with a wire of the defendant Gordon Telephone Company, which, having fallen across the wire of the Charleston Consolidated Railway, Gas & Electric Company, was highly charged with electricity. The liability of the telephone company is not involved in this appeal. In the complaint it is alleged that the wires of the Charleston Consolidated Railway, Gas & Electric Company, from which the fatal current was transmitted to the telephone wire, "were defectively, insufficiently, carelessly, and negligently insulated, and the said defendant, its agents and servants, were well aware of said want of insulation, or could have been aware of the same by the exercise of proper diligence." The Charleston Consolidated Railway, Gas & Electric Company interposed the following demurrer to the complaint:

"That the same does not state facts sufficient to constitute a cause of action against the defendant Charleston Consolidated Railway, Gas & Electric Company, in that there is no allegation in the complaint either that the said Charleston Consolidated Railway, Gas & Electric Company had notice of the fact that a wire of the Gordon Telephone Company had broken and fallen across one of its wires between Meeting and Anson streets, or that sufficient length of time had elapsed after the breaking of the said wire and the falling of the same over the wire of this defendant for the same to have been discovered by the Charleston Consolidated Railway, Gas & Electric Company by due diligence or proper care."

From an order overruling the demurrer, the Charleston Consolidated Railway, Gas & Electric Company appeals.

By the demurrer, appellant, in effect, submits to the court this proposition: Admitting that the wires of the Charleston Consolidated Railway, Gas & Electric Company were strung *below the* telephone wires, and "*defectively, insufficiently, carelessly,* and

negligently insulated," and that that fact was known to the Charleston Consolidated Railway, Gas & Electric Company, or could have been known to it by the exercise of proper diligence, yet that company, as a matter of law, would be exempt from liability for death of a pedestrian, who, without fault, came in contact with a telephone wire which had fallen across the negligently insulated wire, and received the deadly charge from it, unless the Charleston Consolidated Railway, Gas & Electric Company had notice that the telephone wire had fallen across its wire to the street, or a sufficient length of time had elapsed after the fall and contact for the company to discover it by the exercise of due diligence. The extent to which wires conveying deadly electric currents should be insulated or otherwise guarded must be decided by the jury under the facts of each case. No rule of law can be laid down on the subject. *Bridger v. Railroad Company,* 25 S. C. 24. The rule as to the degree of care in the use of electricity is the same as in the use of steam and other agencies — the care must be proportionate to the danger. In determining the danger it is the duty of those in control to have in view all the surroundings, including the contiguity of other wires, and their liability to fall and come in contact with the dangerously charged wire. As said by the Supreme Court of New Jersey in *Anderson v. Jersey City Electric Light Co.,* 7 Am. Electl. Cas. 557, 43 Atl. Rep. 655:

"Care, in this sense, means more than mere mechanical skill. It includes circumspection and foresight with regard to reasonably probable contin-

Electric Light Co. (N. J. Sup), 7 Am. Electl. Cas. 557, 43 Atl. Rep. 654; *Perham v. Portland General Electric Co.* (Ore.), 7 Am. Electl. Cas. 487, 53 Pac. Rep. 14, 40 L. R. A. 799, 72 Am. St. Rep. 730; *Koplan v. Boston Gas Co.,* 177 Mass. 15, 58 N. E. Rep. 183. Hence, when the plaintiff states that the discharge of the fatal current from appellant's heavily charged wire through the telephone wire was due to defective and negligent insulation, a good cause of action is stated. Having held that a good cause of action is stated against appellant, without regard to its actual knowledge of the fallen wire or its diligence in discovering it, it follows that the demurrer cannot be sustained.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

STEINDORFF v. ST. PAUL GASLIGHT CO.

Minnesota Supreme Court — July 1, 1904.

92 Minn. 496, 100 N. W. 221.

NEGLIGENCE — QUESTION OF FACT — DEATH FROM UNINSULATED WIRE. — 1. It is only in exceptional cases, where the evidence is of such a conclusive character that only one reasonable inference can be drawn from it, that the question of negligence is one of law for the court.

2. The plaintiff's intestate was killed while working on the roof of a building by the defendant's uninsulated electric wire, which was strung along the street in close proximity to the roof, but not touching it. This action was brought to recover damages for his death. The trial court at the close of the plaintiff's case directed a verdict for the defendant. *Held,* that the questions as to the negligence of the defendant and the contributory negligence of the intestate were questions of fact, and should have been submitted to the jury.

(Syllabus by the Court.)

Appeal by plaintiff from order directing verdict for defendant. *Reversed.*

H. A. Loughran and *John C. Mangan,* for appellant.

How, Taylor & Mitchell, for respondent.

Opinion by START, C. J.:

The plaintiff's intestate was killed on September 28, 1903, by coming in contact with the uninsulated part of one of the defend-

ant's electric wires. This action was brought to recover damages for his death, on the ground that it was caused proximately by the negligence of the defendant in permitting its wire to become and to remain uninsulated. When the plaintiff rested her case, the defendant's counsel moved the court to direct a verdict for the defendant on three grounds: First, that there is no evidence of any negligence on the part of defendant; second, that, assuming there is such evidence, it does not appear that such negligence was the proximate cause of the injury; third, that the deceased was guilty of negligence contributing to the injury. The trial court granted the motion on the first ground stated, and so instructed the jury. The plaintiff appealed from an order denying her motion for a new trial. The trial court took the case from the jury, and instructed them to find a verdict for the defendant on the ground that the evidence showed that the defendant could not have reasonably anticipated that any person would come in contact with the uninsulated part of the wire; hence it was not negligent to leave it uninsulated. It was originally insulated, but the insulation corroded or wore off at a joint in the wire for a space of some four inches in length. There was evidence tending to show that this condition of the wire had existed for a sufficient length of time before the accident to charge the defendant with notice of the defect. The principal question, then, to be decided, is whether the evidence was practically conclusive that the defendant could not have reasonably anticipated that any person would come in contact with the uninsulated wire. If the evidence was not thus

28, 1903, in retinning a box gutter on the north side of Liedertafel Hall, in the city of St. Paul. The gutter was approximately six inches wide and four and three-quarter inches in depth. The edge of the cornice was six inches from the outside edge of the gutter. One of the defendant's electric wires, one-fourth of an inch in diameter, and of high voltage, was strung along the street parallel to the hall at a distance of seventeen and one-quarter inches from the outside of the cornice, and twenty-two and one-half inches from the outside of the gutter, and 25 inches above the cornice. The uninsulated part of the wire was at a joint therein about midway of the length of the hall. The method pursued by Mr. Steindorff and his fellow workman, Mr. Kuntze, was to shape pieces of tin, about twenty feet long and twenty-eight inches wide, for the gutter, before they were brought on the roof, and then to lay the shaped pieces in the gutter, bend the edge of the sheets of tin over the outside edge of the cornice about four inches, and fasten it with nails. In driving the nails to fasten the tin, the men kneeled in the gutter, and worked toward each other; starting each from an end of the sheet of tin. Steindorff was engaged in driving nails through the tin into the edge of the cornice, and using his hammer in his right hand; and Kuntze, about ten feet away, was facing him, and also at work. Kuntze's attention was attracted by the fact that Steindorff's hammering had ceased, and, looking toward him, he saw Steindorff rising from his knees, and apparently in great distress. He ran to him, and threw his arms around him to prevent his falling off the building, thereby receiving an electric shock himself. Both men fell on the roof of the building. Steindorff was dead. He had caught the exposed joint presumably with his left hand. The joint had been in the same uninsulated and exposed condition for a long time prior to the accident, and its dangerous condition might have been readily ascertained by the exercise of proper care.

To appreciate the dangerous proximity of this defective wire to the cornice and gutter of the hall, we must keep in mind the space the average man occupies, and the length of his arm and body. He would occupy a space of some thirteen inches in width. Working on his knees in the gutter, his hands and arms would be nearly on a level with the exposed joint of the wire, and within seventeen and one-quarter inches of it when nailing the tin to the

outside of the cornice — a highly dangerous place in which to work. The defendant, in the exercise of ordinary care, must have known that there was a fair probability that the gutter, cornice, the roof of the hall would have to be repaired as time went on, and that, to make the repairs, it would be necessary for workmen to go upon the gutter and cornice in close proximity to the defective wire; that is, within a little more than half of the length of a man's arm. Ought the defendant, then, to have reasonably anticipated that such workmen might come in contact with the wire? Is it practically conclusive from the evidence that the question can only be answered in the negative? We are of the opinion that this case is not one in which the evidence and the inferences to be drawn therefrom are of such a conclusive character as to the question of the defendant's alleged negligence, or the contributory negligence of plaintiff's intestate, that only one reasonable inference can be drawn from them. Much less can it be said that the only reasonable inference which can be drawn from the evidence is that the defendant was not negligent. We therefore hold that the evidence was such that the cause should have been submitted to the jury. As there is to be a new trial, we announce this conclusion without any detailed discussion of the facts or the evidence; deeming this to be the fair and wise course in cases where there must be a new trial.

Order reversed and a new trial granted.

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on which the trolley wire was also strung — *held*, that he assumed the risk, after becoming acquainted with the relative localities and distances of trolley pole and wires, and their dangerous possibilities, even though not warned of this specific danger.

Appeal by defendant from a judgment in favor of plaintiff in an action for damages. *Reversed.*

Corliss, Andrus, Leete & Joslyn, for appellant.

A. J. Sawyer & Son (*J. C. Knowlton,* of counsel), for appellee.

Opinion by MONTGOMERY, J.:

This action is brought by the plaintiff, as administratrix of the estate of Herbert J. Harrison, deceased, who met his death while employed by the defendant as motorman on its electric car. The principal question discussed in this court is whether there was evidence tending to show culpable neglect on the part of the defendant, and whether there was contributory negligence on the part of the deceased and his coemployees, and whether the deceased assumed the risk of the conditions of the employment as they existed. For an understanding of the case a full statement of facts is essential, and we adopt the statement given by the counsel for the defendant, with such slight variations as the record makes essential:

For some years the defendant company operated an electric railway between Ann Arbor and Detroit by what may be termed the "direct trolley current system," and plaintiff's employment began while this current was used. Later the defendant acquired the necessary right of way from Ann Arbor to the city of Jackson. In order to operate an electric line for that distance it was at least commercially necessary to install a new system of transmitting electric power or current along the line, which is known as the "high-tension system." The system is a method of generating at the power house a large volume or current of electricity, but with a comparatively low voltage, and converting it into a small current or volume with an exceedingly high voltage, and carrying it out along the line on small wires to be taken off at different points called "substations." At these substations the current is reconverted into the large volume again, with a pressure adjusted to the requirements of the trolley wire. The method of transmission of the current may be likened somewhat to transmitting water

through pipes. If, for instance, the water passing through a four-inch pipe is to be sent through an inch pipe, the current or pressure in a small pipe must be many times greater than in the large pipe. If the pressure in the small pipe is greater than can be used at the other end, then it can be discharged in a four-inch pipe, when the current or pressure would be brought back to what it is in the four-inch pipe at the other end, less the friction. From the foregoing it will be seen that no more actual power, or even pressure, is used to propel cars than would be used by the direct trolley current. In fact, the same direct trolley current is used as before, but the surplus power carried along the line in a different form and manner until it is necessary to use it on the trolley wire. The ordinary mode of transmission of high potential currents is by what is called the "multiphase system." Technically, this consists of "the use of two or more alternating currents of equal period, but differing in phase." "Differing in phase" means that the two alternations or current waves do not come together, but one after or at a different time from the other. The three-phase system is used by the defendant. Three wires are strung along in the form of an equilateral triangle, each substation being fed from a set of these wires. Theoretically, in each of these triangular sets of wires, one of them at any given moment of time is dead, but, as it is so only for an infinitesimal part of a second, it is for all practical purposes very much alive at all times and dangerous, carrying a voltage of upwards of 22,000. To establish this system it was necessary to set a new line of poles. The high-tension wires were carried on two cross-arms, one above the other, the longer one being at the top, carrying four of these small wires, and the lower one carrying two. These six wires formed two triangles, with one of the points of each downwards. Below these cross-arms on the same pole is an arm long enough to extend a little past the center of the railway track, so as to carry suspended from it two trolley wires six inches apart and eighteen and one-half feet above the rails. The northerly trolley wire is used by the cars going west, and the southerly by the cars going east. From the poles to the center of the track it was six feet four and one-half inches. The trolley arm, therefore, would have to be some three or four inches longer in order to carry the farther trolley wire. The lowest high-tension wires are between twenty-six and

twenty-seven feet above the rail, and between four and five feet to the side of the center of the track. The poles carrying these wires and trolley arms were thirty-five-foot poles as a rule, except in places where, to avoid trees and buildings, it became necessary to carry the high-tension wires to avoid contact. The undisputed testimony is that the thirty-five-foot pole is the standard height for carrying high-tension wires in suburban railway construction.

In August, 1901, the reorganization of the line was begun. The work of stringing the wires commenced about the middle of November of that year, and was completed about the middle of February following, but a portion of the high-tension system was put in operation January 12, 1902, being something over a month before the entire work was completed. While the work of setting new poles and stringing the high-tension wires was going on, the defendant also reorganized its power house, and built its substations, and put in the new machinery and appliances for generating and handling the high-potential currents as well as the necessary transformers and converters. The entire work was done by Westinghouse, Church, Kerr & Co., under the supervision of its superintendent, Mr. Charles Riley. It is not believed that there will be any dispute over the matters contained in this preliminary statement, nor that it will be necessary to go further into the details of construction in order to give a correct understanding of the general conditions of the railway at the time of the accident which is the origin of this suit.

Herbert J. Harrison began work for the defendant in September, 1900, first as conductor, then as a motorman, on the Ann Arbor city line, on which he remained for a little over a year. During nearly all of that period, if not all of it, he lived at Inkster, Wayne county, and most of the time went to Ann Arbor in the morning and returned in the evening, riding both ways over defendant's main line. While thus going back and forth he asked for and obtained permission to ride with the motorman, and received from him instructions in the operation of the large suburban cars. It is a conceded fact that he thus became a competent motorman. It should also be said that Mr. Harrison was a man of good habits and careful in the management of matters put in his charge. Mr. Harrison began operating suburban cars on the *main line* from Detroit to Jackson *some time after August 7, 1901,* which was the

time he left the Ann Arbor city line. It may have been immediately afterward, as there is no evidence of his laying off. This would be about the time the work of laying out the new system began. He thus had an opportunity of daily observing the work of setting the poles and stringing the wires as it progressed. Moreover, the general headquarters of the road are at Ypsilanti. The power house at Ysilanti was a general rendezvous of the conductors and motormen, where the work of reconstructing the system and the coming installation of the high-tension current was a matter of daily discussion and inquiry by them. Mr. Harrison was very frequently there, and made many inquiries of Mr. Riley, superintendent of construction, about the new system. He asked how high the voltage was to be, and other similar and most natural questions for one who was to use the current. Under the old system it was usual, if the trolley wire was down on the track, to pass a rope around it to pull it off, or to take a piece of dry board and push it away. Harrison asked Riley if it would be safe to put a rope around a high-tension wire. Riley said, "No; keep away from it." It was a matter of common knowledge among all the employees that the current was dangerous, and that they should use the utmost care to prevent making a contact with the high-tension wires. Harrison himself warned one of the men to be very careful.

The trolley poles in use on defendant's line are eleven and one-half feet long. Each of defendant's cars carry an extra trolley pole lashed to the top of the car, to be used in case the one in use becomes disabled. One of the duties of the men operating the car is to climb on the top of the car to change the trolley pole whenever it becomes necessary, and this is one of the duties about which they are instructed. All the men were well informed of and understood the danger of contact with a high-potential current, and were warned to "avoid in every way possible from getting a shock." On the night of March 11, 1902, at about 9 o'clock in the evening, car No. 6 was coming east from Jackson in charge of Henry J. Pullen, conductor, and Herbert J. Harrison, motorman. About three miles west of Chelsea, the trolley jumped from the wire twice. Then Pullen gave a signal to Harrison to come back and see what was the trouble. He did so, and discovered that the wheel or trolley would not revolve. The night was dark, and it had been raining hard, so it was decided to run to Chelsea before

changing the trolley. When they arrived there they climbed upon the car to change poles. The pole which had been in use was allowed to stand nearly upright, and Pullen took hold of it while Harrison loosened the burrs or nuts which held the pole in the socket. It is customary to first loosen the pole, and then both persons lift it out, and both take hold of the new one and place it in the socket. On this occasion Harrison loosened the burrs until Pullen said he thought it would come out. Harrison said, "Wait a minute," and then straightened up and took hold of the trolley. They both lifted, but could not get it out. Harrison said, "I will have to loosen it a little more," and proceeded to do so. Pullen still had hold of the pole, and was twisting it and lifting, and said again, "It is loose enough now, Herby," and, without waiting for Harrison to help him, he lifted it, and he said, "It gave way all at once; it just shot right up." Then there was a flash, and that was all Pullen could remember of the transaction.

The socket is a part of the revolving stand on the top of the car. It has a very strong spring attachment which will cause the trolley pole to stand upright, or nearly so, when the trolley is taken off the wire. In removing the trolley pole the trolley stand is left so that the pole can swing back lengthwise of the car. When in that position there is no possible way of making the pole swing sidewise while it remains in the socket. While the trolley pole is standing up, it is quite close to the trolley wire. It does not reach as high as the lowest high-tension wire, and it is between four and five feet to the side of it. It cannot be brought nearer any of the high-tension wires until taken out of the socket. The trolley stand has a ground connection, so that in removing the trolley pole care must be taken not to make contact with the trolley stand and at the same time with the trolley pole after the latter is removed from the socket. If such a contact be made, then if the trolley pole touches either the trolley wire or the high-tension wires a dangerous, and perhaps, fatal, shock will be received. It was the claim of the plaintiff, and the testimony was such as to warrant a finding of fact by the jury, that the trolley pole came in contact with the high-tension wires, and by this means the death of Harrison was caused.

It appears from the measurements which the defendant presented in the case that, when the *trolley stand was revolved* so that

the trolley pole would run at right angles with the car, the trolley could be raised within one foot six and one-half inches of the nearest high-tension wire, which was between four and five feet to the side of the center of the car. The lowest high-tension wire is between six and seven feet higher than the trolley wire, which is five feet eleven inches above the running board, which is on top and the highest part of the car. It was shown that the distance from the trolley to the nearest high-tension wire is fully as great on the defendant's road as that of any other road in the country. The overhead construction of the road is fully as good, if not better, than any other seen by the defendant Riley, who is personally familiar with over fifty electric railways using the high-tension system. The same witness also testified that the distance the poles were set from the center of the track is the standard set. Another expert, Alfred C. Marshall, who is chief engineer of the Rapid Railway System, stated that the thirty-five-foot pole is the approved standard. There was no proof offered tending to show a faulty construction of any kind, nor was it claimed that there is any overhead construction anywhere in the country where the distance between the high-tension wires and trolley is greater.

In our view of the case, the question of first importance is whether the deceased assumed the risk of the conditions as they existed. The general rule upon the subject of assumed risk is too well settled in this State to make it necessary to quote from the decided cases at any great length. The employee is, as matter of law, held to have assumed the risk of all such dangers incident to the employment as he knows to exist or should have acquainted himself with. *Railway Co. v. Smithson,* 45 Mich. 221, 7 N. W. 791; *Ragon v. Railway Co.,* 97 Mich. 265, 56 N. W. 612, 37 Am. St. Rep. 336; *Balhoff v. Railroad* Co., 116 Mich. 606, 65 N. W. 592; *Bauer v. American Car and Foundry Co.* (Mich.), 94 N. W. 9; *Bradburn v. Railway Co.* (Mich.), 96 N. W. 929. The rule is recognized by plaintiff's counsel, but it is contended that in the present case the plaintiff should not be held to have assumed the risk, for the reason that Harrison was not informed that the high-tension wire came within one foot and six inches of the end of the trolley pole when placed on a direct line from the trolley stand, and that the trolley pole was, therefore, in danger of coming in contact with the high-tension

wire while the attempt was being made to remove the pole; that it was not shown that Harrison was instructed or knew that it was dangerous to remove the trolley pole on the side of the car toward the high-tension wire; that he was not instructed that, if the trolley pole came within one-half inch of the high-tension wire, electricity would arc.

Were instructions of this character essential before it be said that the deceased assumed the risk? He knew of the fact that contact between the trolley pole and the high-tension wire would be exceedingly dangerous. Indeed, contact between the pole and the trolley wire with a pole removed from the socket was dangerous only in less degree. He certainly knew that this wire was near enough to be reached by the trolley pole upon its being removed from the socket. Knowing, as he did, of the high voltage in the conducting wires, it would seem obvious that during the term of his employment he should have noticed that they were near enough to come in contact with this pole if the pole was directed toward them. The occasion for special instruction that this pole of ten and one-half feet in length would reach that distance in whatever direction it was extended is not manifest. And that the distance from the car to the high-tension wire could be as easily estimated by deceased and his coemployees as by any *alter ego* of the defendant is equally manifest. This being so, it would be understood by him, as well before any instruction in that regard as after, that if this trolley pole was removed in the manner in which it was on this occasion it was likely to, or at least might, come in contact with this high-tension wire. It is undoubted that, knowing this, he knew that any such contact was almost sudden death to one in whose hands the trolley pole was at the time. It seems clear to us, therefore, that the danger was obvious, and that it was one assumed by the deceased.

The suggestion that he did not have knowledge that electricity would arc is of little force. The testimony shows that electricity arcs when a conductor like the trolley pole in question in this case is brought either in contact with the high-tension wire or within half an inch of it. If the case were one in which in the performance of the duty of the employee it became necessary for him to bring this conducting trolley pole within half an inch of the high-tension wire in the ordinary discharge of *his duty, a different* ques-

tion might be presented. But the suggestion that he might make nice calculations as to carrying this pole within half an inch of this dangerous current, but would be guilty of negligence himself, or at least held to have assumed the risk, if the pole came in actual contact with the wire, is without force.

Plaintiff's counsel cite us, as sustaining their contention that this was a case for instruction, *Smith v. Peninsular Car Works*, 60 Mich. 501, 27 N. W. 662, 1 Am. St. Rep. 542; *Ribich v. Lake Superior Smelting Co.*, 123 Mich. 401, 82 N. W. 279, 48 L. R. A. 649, 81 Am. St. Rep. 215; *Walker v. Railway Co.*, 104 Mich. 606, 62 N. W. 1032. In the Smith and Riblich cases the duty which was neglected by the master was that of notifying the employee of a latent danger which consisted of properties of substances with which he was bound to deal, which might be unknown to an ordinary workman. In the present case the properties of this high-tension wire were unquestionably known to the deceased. No further instruction was required as to that. The contention of plaintiff gets down to this: that he should have been told the precise location of this wire with reference to the top of the car, and that the wire could be reached by a pole of the length of the trolley pole. These facts were open to his observation and to the observation of every employee who passed over this road. The case of *Walker v. Railway Co., supra,* was one in which the danger to the injured party arose out of a want of knowledge of conditions which were not obvious. In the present case we think the danger was obvious and it was assumed, and upon this ground a verdict should have been directed for the defendant. We find it unnecessary to discuss the other questions in the case.

The judgment will be reversed, and new trial ordered. The other justices concurred.

HARTER v. COLFAX ELECTRIC LIGHT & POWER CO.

Iowa Supreme Court — July 13, 1904.

124 Iowa 500, 100 N. W. 508.

1. CARE REQUIRED BY ELECTRIC COMPANY. — An electric company is held to the highest degree of care in the construction, inspection, repair, and operation of its plant and machinery, but it is not an insurer against all accidents, nor is it responsible in the absence of some showing of want of care.
2. PRESUMPTION OF NEGLIGENCE. — Where a guest in a hotel was injured by an electric light wire falling on him and thereby giving him a shock, and the wiring was not done by the defendant who furnished the electricity, negligence will not be presumed.
3. EXPERT EVIDENCE. — In an action to recover for injuries received by coming in contact with an electric wire, experts should not be permitted to state that locomotor ataxia might result from such a shock as plaintiff claims he received, where there was no evidence that he had any symptoms of this trouble.

Appeal by defendant from verdict and judgment for plaintiff. *Reversed.*

G. M. Tripp, for appellant.

Opinion by DEEMER, C. J.:

The action was originally brought against the defendant and one Martha Croft, who it is claimed owned a hotel in Colfax known as the "Mason House," and operated in connection therewith the bathroom in which plaintiff claims he received his injury. The verdict was against both these defendants, but the trial court sustained a motion for a new trial as to defendant Croft, and rendered judgment against the electric light and power company alone, and the appeal is by that company.

The negligence charged is that defendants, and each of them, carelessly and negligently suffered and permitted the said electric light wires and the lamp attached thereto to be insecurely fastened to the ceiling of the room in which said injury occurred, and in using and permitting the use of the wires as aforesaid, the same being unsuitable and unsafe by reason of defective insulation; that said defendants, and each of them, were further negligent in

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Care Required of Electrical Companies. — See *Guest v. Edison Illuminating Co., post,* and note thereunder.

Expert Evidence. — See *Citizens Telephone Co. v. Thomas, post,* and note.

not keeping the fastenings of the lamp and the wires connected therewith in good repair and of sufficient strength for the purposes for which they were used; in permitting the said wires to become of inadequate strength and unsafe for the purpose for which they were used; in carrying and permitting to be carried over said wires dangerous currents of electricity, without having said wires properly insulated; in failing to exercise reasonable care in seeing that said wires and the fastenings thereof were kept in good repair and in a safe condition, in that said wires and said fastenings were originally insufficient, unsuitable, improper, dangerous, and unfit for use, and were so known to the defendants and each of them. The trial court submitted the questions of insecure fastening of the electric light wire to the ceiling of the bathroom and the passage of a dangreous current of electricity over improperly insulated wires to the jury, and said, in effect, that if the wires and lamps in the bathroom were not safely and properly insulated or secured, and defendant conducted a dangerous current of electricity over and through said wires, knowing the dangerous character of the current, and that if such wires and lamps fell upon and injured the plaintiff, then the defendant company would be guilty of negligence, notwithstanding the wires and fixtures were not owned by the company. It also instructed that from the fact that the accident occurred, and the nature thereof, the presumption arose that the defendant was guilty of negligence, and that the burden was upon the defendant to rebut such presumption. Plaintiff testified that he went to the bathroom to take a bath, and that after he had undressed, and while standing under the electric light wire, it fell down upon him, burned his back, his hands, and his feet, and gave him a shock which rendered him unconscious. He said that the floor was wet and sloppy, and that his body was covered with prespiration. He did not know of his own knowledge how the wire was fastened to the ceiling, nor did he pretend to speak of the character of the insulation upon the wires. This, in addition to testimony as to extent of character of plaintiff's injuries, and some opinions of experts, regarding the character of electricity necessary to produce such injuries as plaintiff complained of, was practically all there was to his case. True, he introduced one witness who was in the room the second day after the alleged accident, and saw the electric wire lying on the

floor of the bathroom, and who about ten days afterward was in the bathroom again, and took hold of a wire he found there, and felt the effects of electricity, but who said that the wire was the kind ordinarily used for electric lighting purposes. The defendant's evidence showed that the bathroom was in charge of a man by the name of James, who rented the same from the Crofts. The defendant also produced the electric light wire which was in the bathroom when it is claimed plaintiff was injured, and showed that it was all properly insulated. It also showed that it did not furnish the wire or fixtures for the Mason Hotel, and that they belonged to the proprietors thereof. It further showed that its system was such as to require transformers or converters; that it had one at the Mason House, properly equipped, which reduced the current from 1,100 volts on the primary wires to 52 on the secondary, which ran from the transformer into the hotel; that this transformer was in good condition; and that it had no knowledge of defects of any kind in the wiring of the hotel.

It is shown beyond controversy that, if such a current as the primary wires carried had been conveyed into the hotel, it would have burned out the fuse in the transformer, and extinguished all the lights in the hotel; that it would also have burned out the fuses in the rosettes, which are ordinarily attached to the ceiling whenever a light is intended to drop therefrom. It further appears that none of the lights in the hotel were extinguished save the one in the bathroom; that none of the fuses were burned out, and that the transformer was in good condition after the accident. The testimony from the experts all shows that it was impossible to form what is known as a "ground" beyond the transformer which would carry any greater current of electricity than ordinarily passed over the secondary wires, which was fifty-two volts, provided, of course, that the transformer was in good condition. There was some testimony from the defendant that the wire in the bathroom was held in place by a screw hook instead of a rosette, and that this screw hook broke or pulled out, and let the wire down upon the plaintiff. It is further shown that fifty-two volts of electricity would not produce the injuries of which plaintiff complained, nor any serious injuries of any kind. It is also shown that there was a meter in the Mason Hotel, which would have been burned out had any *such current as the plaintiff* com-

plains of passed over the secondary wires. Further it was show that it was impossible for a current of 1,100 volts to pass by in duction through the converter so as to produce a dangerous curre on the secondary wires.

This was practically all the evidence in the case, and, aside fro some rulings on evidence, the only questions for our determinatio are, does it show negligence on the part of the defendant compan and was the court right in giving the instructions to which we hav referred? As there is no showing that the defendant compan did the wiring of the hotel or furnished any of the electric lig wires or fixtures used therein, it was not, of course, responsib for the fall thereof. It owed the plaintiff no duty in this respec It did, however, owe to the owner of the property, and to an person rightfully upon the premises, the duty of not sending in the hotel a deadly or dangerous current of electricity. Handlin as it did, a dangerous element, it was held to the highest degr of care in the construction, inspection, repair, and operation its plant and machinery; but it was not an insurer against a accident. Nor was it responsible in the absence of some showin of want of care. There is absolutely no showing that defenda knew that it was sending a dangerous current of electricity in the hotel. If it maintained its transformer in good conditio and sent into the hotel no more than fifty-two volts of electricit which the evidence shows would not have been dangerous, and t accident occurred by reason of a short circuit created by the fa of the wire upon the plaintiff, the defendant would not be r sponsible, unless it knew or should have known of the conditi of the wire, and that through a fall upon some one it was like to produce a short circuit, which would injure the person who body might form it.

The maxim *res ipsa loquitur* does not apply to such a case this, for there is no evidence that the accident was due to a da gerous current knowingly, or even negligently, sent into the hot by the defendant company. The testimony shows that the neg gence was primarily that of a third person in wiring the hou in such a manner as that the fixtures were likely to fall and inju some of its occupants. Plaintiff's theory seems to be that wh the wire fell upon him a short circuit was created, which did t damage complained of. This was due, not to defendant sendi

a dangerous current into the house, but to something over which it had no control, and for which it was not responsible.

The trial court was in error in submitting the case to the jury on the theory that defendant sent a dangerous current into the house knowing it to be dangerous, for the reason that there was no evidence to sustain any such instruction. It also erred in submitting the case to the jury on the theory that under the circumstances shown a presumption of negligence on the part of the company arose which it was its duty to rebut. This rule does not apply where the negligence of a third person intervenes. The evidence shows without dispute or question that if defendant had sent into the hotel such a current of electricity as it is claimed it did, it would have burned out the fuses in the transformer, destroyed the meter, burned out all the fuses in the fixtures, and destroyed the lights. None of these things occurred, however. The only possible theory, then, on which a recovery may be had is that the wire coming in contact with plaintiff's body, he at the time standing on a wet floor, formed a short circuit, and that he was injured by reason thereof. That phase of the case was not submitted to the jury. Should we concede that it was the duty of the defendant to inspect electric wiring and fixtures in the hotel — a matter of much doubt, and which we do not at this time decide — there was no evidence that defendant failed to make this inspection, no evidence as to when the hotel was wired, and no evidence that defendant knew there was a wire in the bathroom. But as the case was not submitted on that theory, we need not further speculate as to defendant's liability thereunder. Unless we accept as proof of negligence the fact that the accident happened under the circumstances already narrated, there is nothing in the case tending to show liability on the part of the company. Under the facts disclosed we do not think this presumption obtains. But, if it did, it is thoroughly demonstrated that defendant did not knowingly send into the hotel a current of dangerous voltage. Indeed, we are of the opinion that plaintiff could not have received the shock he claims to have had without some evidence thereof being found in the other fixtures or lights of the hotel. And, as we have said, none of them were disturbed. The meter remained intact, and the transformer continued to perform its functions. None of the lights in the hotel were in any manner

affected, and none were extinguished save the one in the bathroom, which fell to the floor. The testimony shows that it was a physicial impossibility for these things to exist if such a current as plaintiff claims passed through him. If defendant sent into the building no more than a current of fifty-two voltage, and plaintiff received his injuries through a fall of a wire for which defendant was in no manner responsible, then defendant cannot be held liable for the injuries received. *Griffin v. Jackson Light Company* (Mich), 7 Am. Electl. Cas. 657, 87 N. W. 888, 55 L. R. A. 319, 92 Am. St. Rep. 496; *National Co. v. Denver Co.* (Colo. App.), 7 Am. Electl. Cas. 715, 63 Pac. 949. The testimony shows that the primary wires of the defendant company were all in good condition at the time the accident is said to have occurred, and that defendant was not negligent with respect thereto. The case in some of its aspects is not unlike that of *Martinek v. Swift & Co.* (Iowa), 98 N. W. 479, in which we held that no negligence of the defendant was shown. See, also, *Knowlton v. D. M. Edison Co.,* 8 Am. Electl. Cas. 800, 117 Iowa, 456, 90 N. W. 818.

This disposes of the case, but it is well to say that some errors were made in rulings on evidence which should not be repeated on a retrial. For example, some of the hypothetical questions put to plaintiff's experts were not supported by the testimony. For instance, experts were permitted to state that locomotor ataxia might result from such a shock as plaintiff claims he received. There was no evidence that he had any symptoms, even of this

electricity received as the result of the crossing of a primary and secondary wire installed by defendant. It appears the former carried 2,200 voltage of electricity, and the latter connected with the electric fixtures at the residence of deceased.

Evidence to the effect that such wires were strung on the same cross-arm, 16 inches apart, upon poles 100 feet distant from each other, that they had been crossed two weeks before, and again found to be crossed a few hours after the accident, coupled with evidence tending to show that such wires were permitted to sag four feet between poles, and that the insulating material was worn off at the point of contact, taken in connection with other evidence introduced, is sufficient to support a verdict in an issue charging defendant with negligence in the construction and maintenance of its wires.

2. ELECTRIC COMPANIES — DEGREE OF CARE REQUIRED. — Electric companies are bound to use reasonable care in the construction and maintenance of their lines and apparatus. This care varies with the risks to be apprehended from negligence. Where the wires carry strong and dangerous currents of electricity, and the result of negligence may be exposure to death or serious accident, a high degree of care is required. Under such circumstances "reasonable care" and a high "degree of diligence" may be deemed to be synonymous.

3. DUTY OF PARTIES INSTALLING ELECTRIC LIGHT FIXTURES — CONTRIBUTORY NEGLIGENCE. — Parties installing electric light fixtures in houses are not bound to anticipate that electric light companies furnishing electricity to the public will be negligent in either the construction or maintenance of their respective systems connecting therewith, and the installation of a defectice electric socket by plaintiff's intestate at his place of residence did not constitute such negligence as will preclude a recovery herein.

4. EVIDENCE — OPINIONS OF PHYSICIANS. — Opinions of physicians, based upon facts assumed in a certain hypothetical question, *held* admissible. Other errors assigned do not constitute reversible error.

(Syllabus by the Court.)

Appeal by defendant from a judgment for plaintiffs, and from an order denying a motion for a new trial. *Affirmed.*

Francis W. Sullivan, for appellant.

Davis, Hollister & Wilson, for respondents.

Opinion by DOUGLAS, J.:

Appeal from an order of the District Court denying the motion of defendant to set aside the verdict of the jury and to direct judgment in favor of defendant, as well as for a new trial.

This action was brought by the administratrix and administrator of the estate of Samuel V. Gilbert, deceased, to recover damages arising from the alleged negligence of appellant resulting

in the death of said Gilbert. At 3 o'clock in the morning of April 28, 1903, the deceased, accompanied by his wife, went into his bathroom, and took hold of an electric light fixture with one hand and a water faucet with the other. A blue flame and sparks were immediately noticeable at the point of contact with the electric light fixture, and he fell backward dead. Both hands were burned, and in appearance resembled flesh seared with a hot iron. He was in perfect health at the time. An autopsy disclosed that such burns may have been caused by electricity. The blood was fluid, not coagulated; and, slight hemorrhages had occurred in the lining membrane of the stomach and also in the nostrils or bronchial tubes. It is conceded these conditions are commonly present in cases of death by electricity. Physicians called at the trial stated that they were unable, from the appearance of the deceased, to form an opinion as to the cause of death, but each testified, against appellant's objections, upon the assumption set forth in the following question, that in his judgment death resulted from a shock of electricity:

"*Q.* Now assuming, however, that on the morning before he died, or of his death, he received an electric shock by coming in contact with an electric light fixture and at the same time putting his hand upon a water fixture for to complete the circuit, taking that fact together with the conditions that you found there at the autopsy, what is your opinion as to the cause of death?"

Appellant was engaged in the business of furnishing electric light to the deceased and other patrons, and to convey such electricity strung wires upon poles about 100 feet apart in the streets of the city of Duluth. Two weeks prior to this accident two of these wires were found to be crossed, but evidence was offered

wire at this point of contact. Five hundred voltage is sufficient to cause death. Secondary wires ordinarily carry a voltage of not to exceed 100. On the morning of the 28th, while such wires were crossed, another party in the basement of the house occupied by the deceased received a terrific shock and was knocked down upon touching an electric fixture with his hand, which was encased in a heavy glove. The glove was badly burned. We are of the opinion the admission of the evidence, as well as the evidence tending to show that such wires were crossed at 7 o'clock on the morning of the accident, was not error. While the conditions existing after an occurrence are ordinarily inadmissible as tending to show a prior state of facts, still such conditions are often extremely material, and almost conclusive. Evidence was offered tending to show that the insulated material upon the primary wire was so badly worn as to indicate that it had been in this condition a number of days, which fact, independent of other considerations, made such evidence material, as it tended to show the wires had been crossed for considerable time before the accident.

It appears from the record that electric wires are ordinarily hung with a slack of five inches for every 100 feet, for the purpose of allowing for changes in temperature. The weight of evidence indicates that one inch of slack in a wire will produce four inches of sag between poles 100 feet apart. These wires were strung by appellant sixteen inches apart upon a single cross-arm. The evidence offered was conflicting, but tended to show the sag at the point of contact to be from two to four feet. There was sufficient sag so that the primary wire swung under and looped back over the secondary wire. It is conceded that the weight of the wire gradually increases the sag, and requires that such wires be shortened from time to time. A rising temperature increases the length of wire, and, conversely, cold shortens it. For this reason a slack of four or five inches is necessary between posts 100 feet apart.

Respondents based their cause of action upon three distinct acts of negligence. They were tersely stated in the charge of the court as follows:

"Negligence, if any, may have been with respect to the original construction in placing the wires too close together, or it may have been in placing or allowing the wires to become too slack as suspended from the cross-arm, or it may have been only in allowing the wires to become and remain crossed,

although there may have been no negligence in the other particulars. Although the construction and maintenance, including the suspension of the wires, may have been all that reasonable care could require, there may still have been negligence if the wires were permitted to become crossed, and to remain so for an unreasonable length of time, no matter what the cause."

We are of the opinion the evidence clearly sustains the verdict of the jury in finding deceased came to his death from a shock of electricity; that such electricity passed into his house from the primary wire over the secondary wire referred to; and that the questions involving the negligence of appellant either in stringing the wires dangerously close together, or in permitting them to become too slack, or in allowing them to remain crossed for an unreasonable length of time, were fairly submitted to the jury for determination.

Evidence was offered tending to show the wires were permitted to sag approximately four feet; that they had been crossed two weeks before, and, after a high wind, were crossed on the morning deceased came to his death. Taken in connection with the fact that wires carrying deadly current were strung but sixteen inches apart, we are of the opinion the evidence supports the verdict. The fact that a high wind was blowing the night before cannot be pleaded as an excuse, as the court will take notice that high winds are to be expected in that climate.

In our judgment, the court did not err in allowing the physicians to answer the question above set forth. Independent of knowledge that the deceased received a shock of electricity, the

dents and injury, and the neglect so to do will be regarded as proof of culpable negligence." Second. "It is due to the patrons of the defendant electric company that it shall be required to exercise a high degree of care in the construction, extension, and care of its wires and poles, to the end that said patrons may not be injured by having a high and dangerous current of electricity turned into the electric light fixtures in the houses of said patrons. In all cases where the danger to be apprehended is great, care and watchfulness must be commensurate to the danger."

Elsewhere the trial court charged the jury:

"In the construction, maintenance, and operation of the wires in question it is the duty of the defendant to exercise ordinary reasonable care to prevent injury to persons who might have occasion to use the current therefrom for lighting purposes. By 'ordinary and reasonable care' is meant such care as an ordinary, prudent, and careful person, having in mind the dangers to be apprehended, would exercise under the same circumstances. The precautions necessary to be taken in the exercise of reasonable and ordinary care vary with the circumstances of each particular case and the degree of hazard connected therewith; greater precautions being necessary in the case of great hazard, and less in cases where there is little danger."

However, appellant was not charged with negligence arising from the failure to adopt and use all means readily obtainable and known to science for the prevention of accidents; therefore the language used in the first request, though perhaps too broad as an abstract proposition, is not strictly appropriate to the issue, and, in our judgment, did not mislead the jury. In *Hoye v. Railway Company,* 46 Minn. 269, 48 N. W. 1117, the following language is used:

"Reasonable care is all that is required; but this must be proportionate to the risks to be apprehended and guarded against."

The rule adopted therein as well as in the case at bar is more broadly stated in Keasbey on Electric Wires, § 245, as follows:

"Electric companies are bound to use reasonable care in the construction and maintenance of their lines and apparatus. This care varies with the danger which would be incurred by negligence. In cases where the wires carry strong and dangerous currents of electricity, and the result of negligence might be exposure to death or serious accident, the highest degree of care is required."

Taking the charge as an entirety, we are of the opinion the court did not err. Under such circumstances reasonable care requires the exercise of a high degree of diligence. *City Electric St. Ry. Co. v. Conery,* 6 Am. Electl. Cas. 217, 61 Ark. 391, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262; *Denver Con-*

solidated Elec. Co. v. Simpson (Colo. Sup.), 5 Am. Electl. Cas. 278, 41 Pac. 499, 31 L. R. A. 566; *Haynes v. Raleigh Gas. Co.* (N. C.), 5 Am. Electl. Cas. 264, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; *Alton R. R. Co. v. Foulds,* 7 Am. Electl. Cas. 548, 81 Ill. App. 322; *Fitzgerald v. Edison Light Co.,* 8 Am. Electl. Cas. 584, 200 Pa. 540, 50 Atl. 161; *Mather v. Rillston,* 156 U. S. 391, 15 Sup. Ct. 464, 39 L. Ed. 464. See, also, *Hoye v. C., M. & St. P. Ry. Co.,* 46 Minn. 269, 48 N. W. 1117.

Evidence was offered showing that the electrical appliances in the house occupied by the deceased were placed there by experts employed by him, and were defective in this: That the socket of the electrical fixture which deceased grasped at the time of his death was not properly insulated in all its parts, and that the absence of proper insulation rendered it possible for a tremendous electrical current to pass through such fixtures upon coming in contact with his hand at a moment when with his other hand he touched a metallic ground connection. It is urged this was negligence on the part of deceased and precludes a recovery. We are of the opinion this contention cannot be sustained. House fixtures are not constructed with a view of connecting wires with death-dealing currents. It appears from the record, secondary wires ordinarily carry a voltage of but 100, or one-fifth the amount of a deadly current, and one twenty-second part of the voltage which the evidence tends to show passed over the wire in question and through the body of the deceased. The deceased was not an electrical expert, and, unlike appellant, he was not engaged in a business which charged him with special knowledge in the premises. We cannot say he was guilty of negligence in not anticipating that primary and secondary wires might become crossed in the streets, and that it was his duty to take precaution to guard against danger therefrom. Neither can we say that his failure to do so was the proximate cause of his death. On the other hand, appellant was charged with ordinary care in each of the particulars submitted to the jury, and we are of the opinion that the evidence sustains the implied finding that it did not exercise such care; and also that other errors assigned are without prejudice to the substantial rights of appellant, and do not constitute reversible error.

Order affirmed.

PEOPLE EX REL. NEW YORK EDISON CO. v. FEITNER ET AL.

New York Supreme Court, Special Term, Oneida County — August, 1904.
45 Misc. 12, 90 N. Y. Supp. 826.

TAXATION — ASSESSMENT OF SWITCHES, WIRES AND METERS. — Switches, wires and meters owned by an electric illuminating company and installed on real property belonging to different individuals to whom the company are furnishing electricity are not assessable as real estate to the electric illuminating company; where they are so assessed such assessment is void and illegal and may be attacked at any time without filing the preliminary objections.

Motion to confirm referee's report made in the proceeding to review assessment. *Modified.*

Beardsley & Hemmens, for relator.

John J. Delany, Corporation Counsel, for respondents.

Opinion by McCALL, J.:

This is a motion to confirm a referee's report made in a proceeding to review an assessment fixed against the Edison Electric Illuminating Company for the year 1900, up to and including

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TAXATION OF ELECTRIC CORPORATIONS.

1. Property Taxable.
2. Taxation of Franchises.
3. Taxation of Gross Receipts.
4. License Tax on Poles.
5. Exemption of Village Lighting Plant.
6. Exemptions — When Electric Company Is Manufacturer.

1. Property Taxable. — Electric light wires, lamps, and poles connected with the machinery at an electric light plant are personal property for the purposes of taxation. *Shelbyville Water Co. v. People ex rel. Craddick,* 4 Am. Electl. Cas. 559, 140 Ill. 545. So are dynamos, switchboards, poles, and wires. *Newport Illuminating Co. v. Tax Assessors,* 6 Am. Electl. Cas. 659. Switches, wires, and meters owned by an electric illuminating company and installed on real property belonging to different individuals to whom the company are furnishing electricity are not assessable as real estate to the electric illuminating company. *People ex rel. New York Edison Co. v. Feitner* (reported case).

But in *Re Toronto Ry. Co.,* 25 Ont. App. 135, it was held that the wires, poles, and rails of an electric railway company are taxable as real estate when erected in the highway.

Tangible property of an electric light company, situated in or under public waters, and being a part or continuation of its system in the public streets and operated by it under its special franchise, cannot be assessed for purposes

the second Monday in January, 1901: First, upon the personal property or capital stock of the company; and, second, upon the cables and conduits owned by the company, assessed as real estate. To the personal assessment as established by the respondents herein objections were filed by the relator within the prescribed limit of time, and it conceded that to the assessment of conduits, cables, etc., as real estate, no objections were filed. The assessment on the personalty made by the commissioners amounted to $1,664,850. The assessment upon the cables and conduits of the company amounted to $80,000. When the matter was reached for a hearing under the writ to review the commissioner's action in establishing the foregoing assessments an order of reference was entered, directing the referee —

"To take and report to this court with all convenient speed (with his findings of fact and conclusions of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made) evidence upon the following points, to wit: First, whether the foundation, sub and super structures, cables, conduits, pipes, wires, and connections assessed as the real estate of the relator were owned by it, and were situated wholly or in part upon private property, and not in, upon, under, or above any street, highway, public place, or public water; second, all the other issues of law

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of taxation by the commissioners of taxes of the city of New York. *People ex rel. Edison Electric Illuminating Co. v. Commissioners of Taxes and Assessments*, 58 Misc. 249, 110 N. Y. Supp. 833.

2. Taxation of Franchises. — The franchise of an electric light company invests such company with an easement in the streets, and is real property subject to local taxation. *Stockton Gas & Electric Co. v. San Joaquin County, post*, 148 Cal. 313, 83 Pac. 54. See also *Patterson & Passaic Gas & Elect. Co. v. State Board of Assessors*, 8 Am. Electl. Cas. 403.

But in the case of *People ex rel. Edison Electric Illuminating Co. v. Assessors of Brooklyn*, 19 App. Div. 599, 46 N. Y. Supp. 388, it was *held* that the value of an electric light company's franchise is not subject to local taxation.

3. Taxation of Gross Receipts. — The power delegated to municipalities to collect license taxes, even for revenue purposes, cannot be construed to include a tax upon gross receipts of an electric light company. *City of Scranton v. Scranton Electric L. & H. Co., post*, 33 Pa. Super. Ct. 431. In the case of *Commonwealth v. Brush Electric Light Co.*, 204 Pa. St. 249, 53 Atl. 1096, an electric light company was taxed upon its entire receipts, including those derived from selling electric power for manufacturing purposes and from sales of electric supplies. The court said: "By section 23 of the Act of June 1, 1889 (P. L. 420), electric light companies are taxed eight mills upon the gross receipts from their business. The appellant, such a company, claims exemption from this tax upon certain items in its gross receipts, because they are not derived from electric lighting. They are for electric power furnished to individuals and corporations for manufacturing purposes, and for sales

and fact arising herein upon the assessment of the personal property (capital stock and surplus) of said relator," etc.

Acting within the scope of the authority so vested in him, the learned referee proceeded to take testimony; and it, together with his findings on the facts and his conclusions as to the law, he has presented to the court in his report, which we now have before us, and which shall go to constitute a part of the proceedings upon which the determination of the court shall be made. As to the conclusion reached by the learned referee upon the question of the assessment on the personalty of the relator, reducing the same to $364,580, both sides seemingly acquiesce — the relator in asking for the confirmation of so much of the referee's report as refers to that feature, and the respondents by asserting in their brief they will not urge that any error has been committed by the referee in this regard. So, therefore, the court accepts that portion of it, and makes it its determination. I regret to say that I am wholly at opposites, and cannot agree with the learned referee on the question of the $80,000 assessment levied on the conduits, cables, etc., of the relator as real estate. He has practically found that in January, 1901, in some 12,000 cases throughout our city,

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of electric supplies, such as lamps, drop lights, fans, etc. The contention of the appellant is that, as it is incorporated as an electric light company, only its gross receipts from electric lighting are taxable. But such are not the words of the statute. They are clear and unambiguous, as they must be, if the commonwealth is entitled to the taxation imposed. *Boyd v. Boyd*, 57 Pa. 98. The tax is not to be paid upon the gross receipts from electric lighting, but upon the gross receipts from the business of the company. For the purpose of enlarging and swelling the volume of its business, it furnishes not only electric light, but electric power to manufacture, and sells electric supplies. Having so extended its business beyond the mere furnishing of light by electricity, the company has largely increased its revenue, and it would be a strained construction of the words of the statute, if the gross receipts from its business should be interpreted as meaning only its gross receipts from electric lighting, simply because it is called an electric light company. It is taxed on what it does. The statute imposes the tax not upon a portion of its receipts, those derived from a particular commodity it supplies to the public, but upon all of its receipts from its general business conducted under its franchises. Having, under what it regards as its franchises, not questioned by the commonwealth, enlarged its business by extending the same beyond the mere furnishing of light, and having realized largely increased revenue from so doing, its plea for abatement of the tax claimed by the State is ungracious, and cannot avail it in the fact of the statute declaring what it shall pay."

4. License Tax on Poles.—A municipality may impose a reasonable license fee upon poles maintained in the streets by electric light companies.

on private properties not owned by this relator, but belonging to different individuals to whom the company was furnishing electricity, they (the company) had switches, wires, and meters; and then, applying the doctrine of *Herkimer County Light & Power Co. v. Johnson,* 37 App. Div. 257, 55 N. Y. Supp. 924, and *People ex rel. National Starch Co. v. Waldron,* 26 App. Div. 527, 50 N. Y. Supp. 523, which he asserts is conclusive in the case at bar, he determines that these switches, wires, and meters are real estate, subject to assessment as such, and, although he finds the value of same to be but about $24,000, yet, because no objection had originally been taken to the action of the commissioners in fixing the amount at $80,000, he (the referee) is prohibited from entering upon the question of the *quantum* of the assessment, and hence the original amount must stand. I cannot find myself in consonance with either of these views.

In my judgment, under the facts revealed by this record, the declaring of these mere incidents to the conduct of this relator's business to be real estate — situated, as the learned referee reports them to have been, not upon property owned by it, but upon the lands of the individuals to whom it was supplying electricity

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Lancaster v. Edison Electric Illuminating Co., 2 Am. Electl. Cas. 116, 8 Pa. Co. Ct. Rep. 178. But when a municipality enters into a contract with an electric light company for the furnishing of light for said municipality, and signs the contract for the same, subject to the supervision of the police department of the city or the city engineer, it gives the right to erect poles and wires sufficient to furnish such light, and cannot afterwards impose a tax or levy for police regulation on any poles or wires used exclusively for the purpose of carrying out said contract; but the municipality has a right to levy a tax for the purpose of police regulation on all wires and poles not kept for the exclusive use of the city contract. *New Castle v. Electric Illuminating Co.,* 16 Pa. Co. Ct. Rep. 663.

A reasonable compensation may be charged an electric company for the right to use the poles of another electric company already occupying the streets. *Toledo Electric St. R. Co. v. Western Electric Light, etc., Co.,* 10 Ohio Cir. Ct. Rep. 531; *Hauss Electric Lighting Power Co. v. Jones Bros. Electric Co.,* 3 Am. Electl. Cas. 75, 23 Ohio Wkly. L. Bul. 137. The extent of such use must be definite. *Citizens' Electric Light, etc., Co. v. Sands,* 4 Am. Electl. Cas. 58, 95 Mich. 551.

In the case of *West Coushohocken Borough v. Coushohocken Electric Light & Power Co., post,* 29 Pa. Super. Ct. 7, an action was brought to recover a license tax placed on electric light poles by an ordinance. It was held that the question as to the reasonableness of the tax was one for the court.

5. Exemption of Village Lighting Plant. — Where an incorporated village was authorized by statute to maintain an electric plant for lighting its streets and for furnishing electric power to parties residing without the

— was a pure fiction, without support of any law that I have been able to find or apply. What is and what is not real estate may perhaps be a somewhat unsettled question, but, in my judgment, it is carrying theory too far to make the holdings of a citizen real estate while a municipality is predicating a tax upon it, and then, after that operation is complete, to have that which was declared tangible enough for that purpose in every other aspect utterly fail to stand any other test, and, as far as substantiality is concerned, vanish into thin air. In applying the doctrine of the two cases quoted above, I am of opinion that the learned referee failed to differentiate between the case where these wires, switches, and meters were upon the property owned by the relator, when it may well be this doctrine would have considerable force, and, on the other hand, where they are found (as in the case at bar) to have been installed upon properties not owned by relator, but by the citizens to whom they were supplying their product. Certainly such a doctrine cannot be applied in such a case. These effects must be clearly denominated personalty if the ownership is to be found in the relator. And being such, this case shows they have already been taxed for same. If they are to be called

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corporate limits, it was *held* that the part of the plant used for lighting the public streets and buildings was devoted to a public use, but otherwise as to the part used to furnish electric light and power outside the corporate limits and to private parties. It was also *held* that, where the property was put to a mixed use, partly public and partly private, with no way of telling how much was put to either use, the whole was taxable. *Village of Swanton v. Town of Highgate*, 81 Vt. 152, 69 Atl. 667.

6. Exemptions — When Electric Company Is Manufacturer. — An electric light company is a manufacturing corporation within the meaning of the New York statute for taxation of corporations, which exempts manufacturing corporations from taxation. *People ex rel. Brush Electric Manufacturing Co. v. Wemple*, 4 Am. Electl. Cas. 563, 129 N. Y. 543; *People ex rel. Edison Electric Light Co. v. Campbell*, 6 Am. Electl. Cas. 653, 88 Hun, 527. This is also true within the meaning of a statute authorizing such corporations to consolidate. *Beggs v. Edison Electric Illuminating Co.*, 3 Am. Electl. Cas. 504, 96 Ala. 295.

The operating of an electric light plant is manufacturing, so that a right of way may be condemned. *Lamborn v. Bell*, 4 Am. Electl. Cas. 573, 18 Colo. 346.

In Pennsylvania it has been held that an electric light and power company is not a manufacturing corporation so as to exempt it from taxation under the statute of 1885. *Commonwealth v. Edison Electric L. & P. Co.*, 5 Am. Electl. Cas. 857 *note*, 32 Atl. 419; *Same v. Northern Electric L. & P. Co.*, 3 Am. Electl. Cas. 857 *note*, 145 Pa. St. 105; *Same v. Edison Electric Light Co.*, 3 Am. Electl. Cas. 857 *note*, 145 Pa. St. 131; *Same v. Brush Electric*

fixtures that are attached to the realty in such a way as to forbid their removal without damaging or working injury to the fee, and the intention was to make them fixtures, then, in all accepted law, they belong, not to this relator, but to the owner of the fee of the several properties upon which they have been placed. In either event this assessment cannot stand. It was a void and illegal assessment, and, being such, it did not require that objections to same should be filed, but is subject to attack at any time without the filing of preliminary objections. It therefore follows that so much of the report, findings, and conclusions of the referee as fixes the assessment of the relator as to its personalty at $364,508 should be confirmed, and that portion of same as establishes as valid the assessment of $80,000 on the cables, etc., as real estate, is not approved, but is set aside, and the said assessment as originally fixed by the respondents herein is vacated and set aside.

Ordered accordingly.

Light Co., 3 Am. Electl. Cas. 857 *note*, 145 Pa. St. 147. The last two cases also hold that the stock of an electric light company issued to the owners of patents in consideration of the exclusive use of their patented appliances within the company's territory is not invested in "patent rights" so as to exempt it from taxation under the statute of 1885. But it was held in *Southern Electric L. & P. Co. v. Philadelphia*, 191 Pa. St. 170, 43 Atl. 123, that the premises of an electric lighting company used as a reserve plant are exempt from taxation, being used for manufacturing purposes.

The Maryland Court of Appeals held, in the case of *Frederick Electric L. & P. Co. v. Mayor, etc.*, 6 Am. Electl. Cas. 644, that an electric company was not a manufacturing industry within the meaning of an ordinance exempting from

WHITTEN v. NEVADA POWER, LIGHT & WATER CO.

United States Circuit Court, D. Nevada — Sept. 24, 1904.

132 Fed. 782.

DEATH BY SHOCK FROM INCANDESCENT LIGHT — SUFFICIENCY OF COMPLAINT. — In an action against an electric light company for the death of an employee of a patron of the company, resulting from a shock from an incandescent light, the complaint alleged that the defendant was engaged to furnish the residence of M. with electricity for lighting purposes; that it was the duty of the defendant to have and maintain a safe plant, machinery, poles, wires, and other appliances for the safe and proper generation, storing, and distribution of electricity, to inspect and examine the same from time to time, and at all times to keep the same in good repair and safe condition; that said defendant negligently failed to discharge its said duties hereinbefore alleged, so that when deceased, an employee of M., took into his hands an incandescent light bulb he received a deadly current of electricity, and was instantly killed, through the wrongful act, neglect, and default of defendant, as aforesaid. It was *held* that the complaint was too general in the allegations of defendant's duty and breach of duty, and was demurrable.

At law. Demurrer to complaint.

This is an action to recover damages for the death of William Whitten, alleged to have been caused by the wrongful act, neglect, and default of the defendant. The fifth paragraph of the complaint reads as follows: "That said defendant at all times mentioned in this complaint, and for a time long prior to the date of the death of said deceased, was engaged in the business of generating, producing, and distributing electricity and supplying the same for light and other purposes, at said county of Washoe, to the general public for hire and for a profit. That said corporation defendant, in consideration of a required compensation, to wit, ten cents per thousand watts for all electricity used, was, on the day of the death of said William Whitten, and for more than six months prior thereto, engaged in supplying J. E. Monroe with electricity for lighting purposes at his residence, to wit, No. 716 North Center street, in said city of Reno, and county of Washoe. That it was the duty of said company, in so furnishing said electricity, at all times to have and maintain a safe plant, machinery, poles, wires, conduits, converter boxes, grounding devices, transformers, ground detectors, lamps, sockets, insulators, and other appliances for the safe and proper generation, storing, and distribution of electricity throughout said city of Reno and to the said premises of the said Monroe, and also to inspect and examine the same from time to time, and at all times to maintain and keep the same in good repair and in good and safe condition, so that the said Monroe and his family and the occupants of his house, and each and all persons lawfully in and about the same, might safely use the said electricity upon said premises without danger of damage,

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Injuries from Contact with Incandescent Lights. — See *Peters v. Lynchburg, etc., Light Co., post*, and note thereunder.

injury, or death to them or to either or any of them. That the said William Whitten, at said time of his death, to wit, on the afternoon of the 24th day of February, 1904, and for one hour prior thereto, was actually engaged at the instance of said Monroe, and for his benefit, in cutting a door through one of the interior walls on the upper floor of said residence, and for said services the said Monroe promised and agreed to pay said William Whitten at the rate of three and one-half dollars per day. That at said time, to wit, during the afternoon of said 24th day of February, 1904, and prior thereto, the said defendant negligently failed to discharge its said duties hereinbefore alleged, so that at the time aforesaid when the said William Whitten took into his hands a sixteen-candle power incandescent electric light bulb or lamp in the room on said premises where he was then engaged in cutting said door, for the purpose of inspecting his said work, and without any carelessness or negligence of any kind whatever on his part or on the part of said Monroe, he received into and upon and through his body a severe and deadly charge and current of electricity, whereby he, the said William Whitten, was then instantly killed, through the wrongful act, neglect, and default of defendant, as aforesaid."

The defendant interposed a demurrer to the complaint upon two grounds: "(1) That said complaint does not state facts sufficient to constitute a cause of action against this defendant, in this: (a) That it does not appear from said complaint that the death of the said William Whitten, deceased, was caused by any negligent act or omission on the part of this defendant. (b) That it is not shown by said complaint how, or in what respect, or by what act or omission, this defendant wrongfully, negligently, or by default caused the death of the said William Whitten. (c) That said complaint fails to show any negligent act or omission causing the death of the said William Whitten. (d) That the death of the said William Whitten is not shown to have been caused by the negligence, wrongful act, or default of this defendant. (e) That it does not appear therefrom that this defendant was guilty of any wrongful act, neglect, or default causing the death of the said William Whitten. (f) That it appears from said complaint that the said William Whitten was instantaneously killed. (g) That it does not appear from said complaint that it was necessary, or not a negligent act on his part, to take

fendant. (f) That said complaint is so uncertain and indefinite that this defendant is unable to ascertain therefrom what act or omission of it caused the death of the said William Whitten, and the defendant is unable to answer the same. (g) That said complaint is so uncertain that it does not give notice to this defendant of any negligent act or omission, or how, or in what respect, this defendant by any negligent act or omission caused the death of the said William Whitten."

Mack & Farrington, for plaintiff.

Cheney, Massey & Smith, for defendant.

Opinion by HAWLEY, District Juge (orally):

It will be observed that the portion of the fifth paragraph of the complaint, which relates to the duty of the defendant in the several particulars therein named, does not contain any evidentiary or ultimate fact. Such averments are generally held to be wholly insufficient unless connected with a statement of the facts from which the law raises the duty. This general principle is too well settled to require extended discussion. 14 Enc. of Pl. & Pr. 332, and authorities there cited.

In *Breese v. Trenton R. Co.* (N. J. Sup.), 19 Atl. 204, the court, in considering an averment of like character, said:

"But this description of the duty of the company is not the statement of a fact. It adds no force whatever to the case laid in the record, and therefore may, without loss, be always omitted; for it is simply and exclusively the pleader's averment of the legal efficacy of the facts stated. Obviously, such construction can have no effect on the mind of the court. * * * The fault of these counts is that they do not show, by a statement of facts, that the duty which they assert has been violated has any existence. The rule upon the subject is thus stated by Addison in his work on Torts: 'The decisions,' observes Lord Campbell, 'show that the allegation of duty in declaration is in all cases immaterial, and ought never to be introduced; for if the particular facts set forth raise the duty, the allegation is unnecessary, and, if they do not, it will be unavailing.' If the particular facts stated in the declaration do not raise the duty, it cannot be established by other facts not stated. The declaration therefore must stand or fall by the facts stated. Negligence creates no cause of action unless it expresses or establishes some breach of duty."

Clyne v. Helmes, 61 N. J. Law, 358, 361, 39 Atl. 767; *City of Chicago v. Selz,* 202 Ill. 545, 547, 67 N. E. 386; *McCune v. Norwich Gas Co.,* 30 Conn. 521, 79 Am. Dec. 278; *Hewison v. City of New Haven,* 34 Conn. 136, 91 Am. Dec. 718.

There are numerous authorities which hold that a complaint in tort alleging negligence must have the requisite definitness to

inform the defendant of the cause of action, and the particular act or omission constituting the tort. *King v. Electric Ry. Co.* (Del. Super.), 41 Atl. 976; *Railroad Co. v. Kistler* (Ohio), 64 N. E. 130; *Taite v. Boorum* (Sup.), 74 N. Y. Supp. 874; 5 Enc. of Pl. & Pr. 863. The debatable question is whether or not the subsequent averment in clause 5 is sufficient. This question is important, and its determination requires careful consideration. It is contended by the defendant that this averment is weakened by the use of the words "hereinbefore alleged" at the commencement of the averment, and by the words "as aforesaid" at the end of the averment. There is much force in this statement. It is not so clear, definite, and certain as it might have been made. But, independent of this criticism, it is contended that this portion of the complaint does not state any specific act of negligence, or any fact which would constitute a cause of action under any recognized rule of State codes or common-law pleadings which requires the pleader to state specifically what acts caused the injury complained of. The defendant, in support of this position, cites Bliss on Code Pl., § 211*a*, where the author said:

"Negligence is one of the facts to be pleaded. It is not a conclusion of law, but a conclusion of fact; an issuable, a substantive fact, to be inferred from evidential facts. The pleader may not say that he was injured, as, that his arm was broken by the negligence of defendant; but he must state specifically what acts caused the injury, adding the negligence as creating the liability; the latter to be stated in a general way."

thus be seen that in applying the different rules we must keep a close and watchful eye upon the case in hand, and by parity of reasoning ascertain which rule should be applied. This task is not always an easy one. It often becomes difficult to draw, with any degree of clearness, the dividing line which separates one case from another. The real question is whether the particular language used in the averment can be sustained by the application of any settled rule of law with reference to the sufficiency of the pleadings in actions of this kind and character. In the consideration of this question the court must constantly keep in mind the necessity of requiring pleadings to set forth facts in such an intelligent manner as to inform the opposite party of the grounds upon which the pleader relies to sustain his cause of action or defense.

In Pomeroy's Rem. & Rem. Rights (2d ed.), § 554, the author said:

"The very object and design of all pleading by the plaintiff, and of all pleading of new matter by the defendant, is that the adverse party may be informed of the real cause of action or defense relied upon by the pleader, and may thus have an opportunity of meeting and defeating it, if possible, at the trial. Unless the petition or complaint on the one hand, and the answer on the other, fully and fairly accomplishes this purpose, the pleading would be a useless ceremony, productive only of delay, and the parties might better be permitted to state their demands orally before the court at the time of the trial."

The gist of the complaint is embodied in the latter portion of clause 5, wherein, after stating how Whitten was engaged, and doing what he had the right to do, it alleged that "he received into and upon and through his body a severe and deadly charge and current of electricity, whereby he, the said William Whitten, was then instantly killed, through the wrongful act, neglect, and default of defendant." If this does not constitute an act of negligence and breach of duty upon the part of the defendant, then the complaint fails to properly state a cause of action, and the demurrer should be sustained. There are many cases which hold that the inference or presumption arising from an injury is one of fact; that it pertains to evidence, rather than the pleading; that under certain circumstances and conditions the most the injured party could do would be to prove the injury and the immediate cause thereof; that this would in such cases cast upon the defendant the obligation to explain or show due care and diligence, and that

while negligence, under general rules, must be alleged and proven, it may, in exceptional cases, be inferred from the testimony as to how the injury was caused, without the plaintiff having in his complaint put his finger directly on the particular defect, carelessness, or negligence which caused the injury.

In *Patton v. Texas & Pacific Ry. Co.*, 179 U. S. 658, 663, 21 Sup. Ct. 277, 45 L. Ed. 361, the court said:

"That while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier — a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely, * * * a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence."

This distinction between the character of the cases must not be overlooked. The rules applicable to one are not always applicable to the other. This is not a case between master and servant. The other class of cases will be referred to.

In 21 Am. & Eng. Enc. of Law (2d ed.) 512, it is said:

"Negligence is never presumed from the mere fact of injury, yet the manner of the occurrence of the injuries complained of or the circumstances surrounding may well warrant an inference or presumption of negligence."

In 1 Shear. & Red. on Neg. (4th ed.), § 59, the author said:

"It is not that in any case negligence can be assumed from the mere fact of an accident and an injury, but in these cases the surrounding circumstances which are necessarily brought into view by showing how the accident occurred contain, without further proof, sufficient evidence of the defendant's duty, and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof of negligence that the injured person is able to offer, or that it is necessary to offer. The accident, the injury, and the circumstances under which they occurred, are in some cases sufficient to raise a presumption of negligence, and thus cast upon the defendant the burden of establishing his freedom from fault."

In section 60 the author said:

"Proof of an injury occurring to defendant as the proximate result of an act which, under ordinary circumstances, would not, if done with due care, have injured any one, is enough to make out a presumption of negligence. When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care."

Several authorities are cited which sustain these rules. See, also, *Gleeson v. Railroad Co.,* 140 U. S. 435, 443, 11 Sup. Ct. 859, 35 L. Ed. 458; *The Joseph B. Thomas,* 86 Fed. 658, 662, 30 C. C. A. 333, 46 L. R. A. 58; *Snyder v. Wheeling Electrical Co.,* 7 Am. Electl. Cas. 473, 43 W. Va. 661, 667, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922; *Boyd v. Electric Co.,* (Or.), 7 Am. Electl. Cas. 605, 66 Pac. 576, 57 L. R. A. 619; *Shafer v. Lacock,* 168 Pa. 497, 504, 32 Atl. 44, 29 L. R. A. 254; *Barnowsky v. Helson,* 89 Mich. 523, 525, 50 N. W. 989, 15 L. R. A. 33.

In notes to 2 Thomp. on Neg., p. 1246, it is said:

"Negligence on the part of the defendant is the gist of the action, and must be charged in the plaintiff's petition. It is not, however, absolutely necessary that it should be averred in terms, if such facts are stated as will raise a presumption of negligence."

In *Cunningham v. Los Angeles Ry. Co.,* 115 Cal. 561, 566. 47 Pac. 453, the court said:

"The demurrer to the complaint was properly overruled. While the negligence was averred in general terms, such mode of presenting the facts is sufficient in this character of action, where, as a general thing, the more specific facts are more largely within the knowledge of the defendant than that of the plaintiff; and the complaint cannot, therefore, be held open to the objection of uncertainty."

See, also, *Railroad Co. v. Jones,* 83 Ala. 376, 382, 3 So. 902.

In *Railroad Co. v. Hicks* (Ind. App.), 37 N. E. 43, it was held that in an action of negligence, where a legal duty is shown, and its breach, a general allegation that the acts done or omitted were so done or omitted negligently is sufficient to sustain the charge.

In *Railway & Illuminating Co. v. Foulds,* 81 Ill. App. 322, the court said:

"When appellant wired the basement or cellar of appellee's house, and agreed to furnish him light for hire, it well knew it was dealing in an element, delivered in a current of high voltage, such as was carried on its primary wires, which was almost certain to bring death to the person who turned on the lamp if there was a ground of the current on the circuit. Hence the law imposes upon it the duty to exercise a high degree of care and skill in the delivery of the element it had contracted for. If the injury itself furnishes a presumption of negligence so as to require the defendant to show, by evidence, that it has been guilty of no negligence that caused it, then it logically follows that all that is necessary to be averred in the declaration to entitle the plaintiff to recover for the injury is the agreement, a negligent breach of it, and the result; also that the plaintiff has not by any neglect on his part contributed to the result."

In *Denver Consol. Electric Co. v. Lawrence,* 8 Am. Electl. Cas. 617, 31 Colo. 301, 309, 73 Pac. 39, 42, where the facts are substantially identical with the case at bar, the court said:

"The plaintiff, while attempting to do that which every patron of the company must do to make use of the electric light, received into his body a current of electricity, burning his hands and feet, and permanently injuring him. Such injuries are not, under ordinary circumstances, received by persons who turn on an incandescent lamp, if the company supplying the current has not been negligent. The defendant, when it contracted with the father of the plaintiff to sell electricity for light, contracted to keep its plant and appliances in such condition that no greater volume of electricity would be carried into the house than was necessary for its proper lighting. The quantity of electricity required for lighting purposes in residences is not sufficient, if it pass through the body, to cause the injuries described by the plaintiff in his complaint. It follows, therefore, that the plaintiff must have received a very much greater quantity of electricity than the company contracted to supply. The court therefore did not err in overruling the demurrer to the complaint, nor in overruling the objections to the introduction of testimony."

The complaint in the present case is almost *verbatim* with the complaint in the Colorado case last cited, the only difference being in relation to the party who was injured, and the effect of the injury. It ought, however, to be said that the laws of Colorado do not provide, like the statutes of this State, that the objections here raised could be taken advantage of by a demurrer, but that such objections must be made by motion to make the complaint more specific. It may, therefore, be presumed that, if a motion had been made to strike out the general clause as to all the duties of the defendant as alleged in the complaint, it would have been granted.

breach of duty is expressed in regard to it. It ought at least to be so specific as to point out some one particular breach of duty, one act of negligence, and it may add as many others as the pleader thinks can be proven. The objectionable feature of the complaint is that it should have stated the plaintiff's cause of action by distinct averments, and not left it to the court to deduce the existence of one fact from the statement of another.

It follows from the views herein expressed that the pleader should draft his complaint with reference to what he expects to prove in support of the allegations he makes. Touching these matters, he must state the ultimate facts upon which he relies in as clear, concise, direct, and specific a manner as the circumstances of his case will permit. If he cannot be specific, the negligence may be stated generally, if in sufficient terms to impart knowledge to the defendant of what it will be called upon to answer. There would naturally be a difference in the allegations of a complaint charging negligence against an electric company where the injury was caused by the wires falling to the ground and a case of negligence in conveying an electric current over its wires into a building, but in both the fact of breach of duty must be alleged. A careful examination of the declarations referred to by the court in *Snyder v. Wheeling Electrical Co.*, 7 Am. Electl. Cas. 473, 43 W. Va. 661, 664, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922, and *Anderson v Electric Light Co.* (N. J. Sup.), 43 Atl. 654, will furnish some guide as to the form of declaration in such cases.

In the light of the authorities discussed at the argument and the views herein expressed, the complaint can readily be amended so as to remove the objectionable features thereof. For the reasons last stated — in the interest and protection of good and safe pleadings — I shall sustain the demurrer, and give plaintiff ten days to amend the complaint.

ALEXANDER v. NANTICOKE LIGHT CO.

Pennsylvania Supreme Court — Oct. 10, 1904.

209 Pa. 571, 58 Atl. 1068.

1. ELECTRIC LIGHT COMPANY — DUTY TO INSULATE WIRES. — It is the imperative duty of an electric light company to perfectly insulate its wires at all points where persons have a right to be, on business or pleasure, and to use the utmost care to keep the insulation perfect.
2. SAME — RES IPSA LOQUITUR. — When the foregoing rule is observed the presumption is that patrons will not be injured; but when a patron is shocked from handling an electric light bulb, the presumption is that the rule has been disregarded.
3. JUDICIAL NOTICE. — It is within the common knowledge of mankind, and therefore a matter of judicial notice, that electricity can be safely conducted and used as an agent for the production of light, heat, or power.

Appeal by plaintiff from order refusing to strike off a nonsuit. *Reversed.*

Before MITCHELL, C. J., and DEAN, FELL, BROWN, MESTREZAT, POTTER, and THOMPSON, JJ.

Edmund G. Butler and *H. A. Fuller,* for appellant.

James L. Morris and *Woodward, Darling & Woodward,* for appellee.

Opinion by BROWN, J.:

The premises of the appellant, the proprietor of a china store in the borough of Nanticoke, were lighted by electricity. The

to show goods to a customer, and, while handling in the usual way, an ordinary incandescent light bulb, suspended from the ceiling by a flexible extension cord, was severely shocked and seriously injured. From the facts submitted, it appeared that when he was shocked the electric wires on his premises were charged with a higher voltage than they should have carried, but the cause of this was not shown to have been any specific negligence of the defendant. Four theories were advanced as to what the negligence was, and four possible causes assigned for the accident. The learned trial judge, having been of opinion that the doctrine of *res ipsa loquitur* did not apply, and that the burden of showing affirmatively the cause of the accident was upon the plaintiff, directed the entry of a nonsuit and refused to take it off, for the reason that, as plaintiff had not shown the cause of the accident, the jury would have had to guess at it if the case had been submitted to them.

Though electricity is the most powerful and dangerous element known to science, it has become part of the commercial, industrial, business, and domestic life of the world, working the wonders of the age. It can neither be seen nor heard, and is as deadly as it is invisible and silent; but, though such are its qualities, the same science that discovered it can control it in the endless variety of uses to which it has been put, and neither death nor danger need be encountered from it, if properly guarded against by those whose duty it is to have it safely conducted to the points at which it becomes only a useful and harmless agency. The appellee was incorporated for the purpose of furnishing light by electricity to the public and individuals in the borough of Nanticoke. It entered into a contract with the appellant to furnish him with such light, and part of its contract — the implied part — was that it would do so safely. Apart from any representation by the superintendent, who assured him, according to his testimony, that the electric light would be perfectly harmless, as there "was not power enough in it to kill a mosquito," it was the implied contract between the appellant and the company that it would supply his premises with a safe electric current for lighting them by lamps which it furnished. By this it is not to be understood that the company became an insurer to its patron against all danger in the use of its electrical appliances on his

premises, but simply that it had contracted with him to protect him from injury by exercising the highest degree of care, skill, and diligence in the construction and maintenance of its plant and appliances. In *Fitzgerald v. Edison Electric Illuminating Co.*, 8 Am. Electl. Cas. 584, 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732, in which a painter went upon the roof of a house in the lawful exercise of his business, and was killed by coming into contact with a defectively insulated wire, we said, through the present chief justice:

> "Wires charged with an electric current may be harmless, or they may be in the highest degree dangerous. The difference in this respect is not apparent to ordinary observation, and the public, therefore, while presumed to know that danger may be present, are not bound to know its degree in any particular case. The company, however, which uses such a dangerous agent, is bound not only to know the extent of the danger, but to use the very highest degree of care practicable to avoid injury to every one who may be lawfully in proximity to its wires, and liable to come accidentally or otherwise in contact with them. The defendant, in accord with the common practice of electric companies, recognized this obligation by insulating its dangerous wire. But the duty is not only to make the wire safe by proper insulation, but to keep it so by constant oversight and repair."

That it is the imperative duty of an electric light company to perfectly insulate its wires at all points where persons have a right to be, on business or pleasure, and to use the utmost care to keep the insulation perfect, has been repeatedly held in other jurisdictions. Among the cases announcing this rule are *Schweitzer v. Citizens' Electric Co.* (Ky.), 7 Am. Electl. Cas. 571, 52 S. W. 830; *McLaughlin v. Louisville Electric Light Co.*, 6 Am.

as was sustained by the present appellant; but, on the other hand, when such injury does occur, the presumption is that the rule had been disregarded. This is manifestly reasonable, for it is within the common knowledge of mankind, and therefore a matter of judicial notice, that electricity can be safely conducted and used as an agent for the production of light, heat, or power. The rule on this subject is nowhere more clearly stated than in *Scott v. London, etc., Dock Co.*, 3 Hurl. & C. 596:

> "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanations by the defendants, that the accident arose from want of care."

To say that one injured as the appellant was cannot recover unless he affirmatively proves, in the first instance, the specific act of negligence of the company which caused the injury, would in many cases be a denial of a right to recover at all, no matter how negligent the company might be. Against patent dangers, or against those as to which he may have been warned, the user of electricity must, of course, guard himself, and if he dallies with them — taking hold, by way of illustration, of an appliance emitting sparks, or handling an uninsulated wire after having been warned not to do so — he voluntarily places himself in peril, and cannot recover, if injured; but when, as here, no danger was seen, and there was no reason to think it was lurking in the company's appliances, its patron took the lamp in his hand, and was severely shocked and injured, the only reasonable presumption instantly is that something was wrong, over which the company had exclusive control. The user of electricity, though having knowledge of its dangerous character, has no knowledge of how this danger can be controlled. He relies upon the company to control it, and when this appellant took the lamp in his hand he had a right to do so without a thought that it had not been controlled. What did he know of what it was necessary for the company to do, as a dealer in electricity, to protect its customers from the danger of its commodity? He is not presumed to know anything. As a rule, the man who takes in his hand an electric lamp or telephone receiver, starts an electric fan, or uses any other appliance which he has a right to use under his contract with an electric company, is helpless if the invisible and

dangerous current has not been properly controlled by the company's officers and employees, who are conclusively presumed to know how to control it.

One of the cases cited by appellant in support of his contention that there was a presumption of appellee's negligence, which it was bound to rebut, is *Alton Railway & Illuminating Co. v. Foulds,* 81 Ill. App. 322. There the wife of the plaintiff below went into a cellar to turn on an electric light, and, on taking hold of the lamp, received a shock and was killed. At the trial the plaintiff did not show by any specific evidence how the increased voltage that caused his wife's death had got on the wire. In affirming the judgment on the verdict in his favor, the court said:

"When appellant wired the basement or cellar of appellee's house, and agreed to furnish him light for hire, it well knew it was dealing in an element that, delivered in a current of high voltage, such as was carried on its primary wires, was almost certain to bring death to the person who turned on the lamp, if there was a ground of the current on the circuit; hence the law imposes upon it the duty to exercise a high degree of care and skill in the delivery of the element it had contracted for. If the injury itself furnishes a presumption of negligence, so as to require the defendant to show by evidence that it has beein guilty of no negligence that caused it, then it logically follows that all that is necessary to be averred in the declaration to entitle the plaintiff to recover is the agreement, a negligent breach of it, and the result; also that the plaintiff has not by any neglect on his part contributed to the result."

There are a number of cases upon which the appellant could place greater reliance as to the high degree of care required of an electric light company, and as to the presumption of negligence in case of injury to its patrons in the ordinary use of its appliances, but reference will be made to only two of them:

In *Denver Consolidated Electric Co. v. Lawrence,* 8 Am. Electl. Cas. 617, 73 Pac. 39 (Supreme Court of Colorado), which was an action against the company for injuries caused by an electric shock to plaintiff while turning on a light in his home, in holding that it was proper to charge that the plaintiff was not required to point out the specific negligence which caused the accident, the court said:

"Ordinarily the allegations of duty and a breach thereof are not sufficient, but, if the duty results from the facts stated, then the allegations of duty may be discarded as surplusage, and the complaint held to be sufficient. If the allegations of the complaint concerning the relationship of the parties and the character of the injuries received make out a *prima facie* case of liability, *then the complaint* is good as against a general demurrer. We think the

complaint does, from the very character of the accident as set forth therein, call upon the defendant to make defense to the case of negligence in supplying electricity to the residence, which the facts, as charged, make out. The business of the defendant is that of selling electricity to the people of Denver — a business so fraught with peril to the public that the highest degree of care which skill and foresight can obtain, consistent with the practical conduct of its affairs under the known methods and present state of its particular art, is demanded. *Denver Consolidated Electric Co. v. Simpson*, 5 Am. Electl. Cas. 278, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566. The plaintiff, while attempting to do that which every patron of the company must do to make use of the electric light, received into his body a current of electricity, burning his hands and feet and permanently injuring him. Such injuries are not, under ordinary circumstances, received by persons who turn on an incandescent lamp, if the company supplying the current has not been negligent. The defendant, when it contracted with the father of the plaintiff to sell electricity for light, contracted to keep its plant and appliances in such condition that no greater volume of electricity would be carried into the house than was necessary for its proper lighting. The quantity of electricity required for lighting purposes in residences is not sufficient, if it pass through the body, to cause the injuries described by the plaintiff in his complaint. It follows, therefore, that the plaintiff must have received a very much greater quantity of electricity than the company contracted to supply. The court therefore did not err in overruling the demurrer to the complaint, nor in overruling the objections to the introduction of testimony. The company insists that it is not an insurer, and that its obligation is that of using ordinary care. We are not prepared to say that it is an insurer, but the patrons of the company have the right to presume that they will not be injured in attempting to use that which the company sells, and that it will do all that human care, vigilance, and foresight can reasonably do, consistent with the practical operation of its plant, to protect those who use its electric light."

The other case is *Royal Electric Co. v. Heve, Rapports Judiciares de Quebec,* 11 Banc. Roi. 436. The facts in that case are singularly analogous to those in the present one; and there, as here, on the trial, different theories were advanced as to the specific negligence of the company which caused the injury. One was accepted by the court below as correct, but the appellate court thought another more probable. The case, however, was disposed of without regard to either; Hall, J., delivering the judgment of the Court of King's Bench, saying:

"But, in my opinion, it is a matter of indifference, legally speaking, where this current originated. The appellants should be held responsible for it under any circumstances. They deal in a commodity of a recognized dangerous character, the control of which is a matter of technical knowledge and experience, and entirely uncomprehended by the general public. When a company like the appellants' organized under the name of an electric company, hold themselves out to the public as dealers in and suppliers of that commodity, for gain, and make contracts with private individuals for fur-

nishing light or power over a system constructed and controlled by themselves, they are bound to deliver it in a form and under conditions of safety for the person and property for whose use the company charge and receive compensation; and they are also bound, in the discharge of their part of the contract, to a supervision and diligence proportionate to the peculiar character and danger of the commodity in which they deal. In the case under consideration, the electric company not only had stipulated, but had exercised the right of supervision of their system within the premises of the deceased. As to that portion of the system outside of his premises, no one but their own employees had even the right of examination or interference. If their transformer was defective, or could become dangerous from the moisture of an ordinary rain storm, it was their business to have discovered and removed the cause of danger. If their system of wiring came within an inch of the wire of another company — even if on a dead wire — common prudence would have suggested their interference, either by a protest against the other company, or by the removal of their own wires, while it is in evidence that the proximity of the two systems had existed for months prior to this accident. The fact that guy wires become, from accident, live wires of the most dangerous character, is one, unfortunately, of too frequent occurrence to be overlooked or ignored in the exercise of the constant supervision which an electric system exacts, and which the public has the right to enforce. The implied contract between the appellants and deceased was that they should supply his premises with a safe electrical current for lighting purposes by the lamps which they furnished. They failed in this respect, and in the use of their lamp he received a current of electricity by which he was instantaneously killed. The presumption is that it came over the same system and from the same source as that by which his ordinary supply was delivered to him by appellants. The burden of proof is upon them to show the contrary. This they have failed to do, and the judgment holding them responsible for the accident should be confirmed."

To these utterances, reason responds, and they must therefore be the law.

The presumption that the appellee was negligent is not conclusive. The accident may have been due to causes over which it had no control, and, if so, not being an insurer, it is not liable. But the presumption is that it was blamable, and it can escape liability for appellant's serious injury only by persuading a jury that it had performed its duties as we have here defined them.

As the burden was upon the defendant to show that it had not been negligent, the last assignment of error is sustained. The rest need not be considered.

Jugment reversed and *procedendo* awarded.

CROWE v. NANTICOKE LIGHT CO.

Pennsylvania Supreme Court — Oct. 10, 1904.

209 Pa. 580, 58 Atl. 1071.

1. NEGLIGENCE — RES IPSA LOQUITUR. — In an action by plaintiff to recover for the death of her husband, caused by a shock from an incandescent light, it is error to charge that the burden was upon the plaintiff of proving the specific negligence of the defendant.
2. ELECTRIC LIGHT COMPANY — CARE REQUIRED. — It was also error to charge that the defendant was not bound to have "an equipment or plant containing the most modern and recent appliances, but only such as were in common and general use at that time for like purposes."
3. INJURY FROM INCANDESCENT LIGHT — LIABILITY OF LESSEE — QUESTION FOR JURY. — In an action by plaintiff to recover for the death of her husband, caused by a shock from an incandescent light, it appeared that the defendant had leased its plant, *held* that, under the evidence, the defendant's liability was a question for the jury.

Appeal by plaintiff from judgment for defendant. *Reversed.*

Before MITCHELL, C. J., and DEAN, FELL, BROWN, MESTREZAT, POTTER, and THOMPSON, JJ.

Edmund G. Butler, for appellant.

James L. Morris and *John M. Garman,* for appellee.

Opinion by BROWN, J.:

On the evening of August 19, 1898, the same time that the appellant in the preceding case (58 Atl. 1068) was injured, the husband of this appellant was shocked to death while using an incandescent light furnished by the same company, the present appellee. The case was taken from the jury by the learned trial judge, and a verdict directed for the defendant. In his charge he instructed them that the burden was upon the plaintiff of proving the specific negligence of the defendant which caused the death of her husband, and stated that it was not bound to have "an equipment or plant containing the most modern and recent appliances, but only such as were in common and general use at that time for like purposes." In these instructions there was error, as appears from what we have said in the former case, and need not repeat here, as to the burden of proof, and the very high

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Injuries from Incandescent Lights. — See *Peters v. Lynchburg, etc., Light Co., post,* and note thereunder, collating the cases in this volume.

degree of care, skill, and diligence required of the light company in the construction and maintenance of its plant and appliances for the purpose of furnishing light to its customers.

The court was further of opinion that the People's Electric, Light, Heat & Power Company, as lessee of the appellee, was liable to the plaintiff, if there was any negligence that caused her husband's death, and the instruction to the jury, in directing a verdict for the defendant, was that the lessor was not liable for the wrongful acts of its lessee. As a general proposition this was undoubtedly correct, but, under the evidence showing that the contract of the deceased at the time he was killed was still with the appellee to furnish him light; that in the very month of his death that company, upon notification by another customer of electrical disturbances, had remedied them temporarily; and that bills for light furnished in August, October and November, 1898, had been received by the appellant from the appellee, made out to her as the debtor to it as the creditor, payments for which were made by her at its office to its clerk, who receipted for the payments in its name — it was not for the court, but for the jury, to say whether the appellee could shelter itself under a lease bearing date June 28, 1898, but which was not recorded until January 10, 1900, of which the deceased knew nothing, and of which the plaintiff had no notice until the statutory period within which she was bound to bring her action had expired.

The eleventh, twelfth, thirteenth and fourteenth assignments of error are sustained.

Judgment reversed and a *venire facias de novo* awarded.

McCABE v. NARRAGANSETT ELECTRIC LIGHTING CO.

Rhode Island Supreme Court — Oct. 15, 1904.

26 R. I. 427, 59 Atl. 112.

1. DEATH FROM SHOCK FROM INCANDESCENT LIGHT — NEGLIGENCE — FAILURE TO REPAIR TRANSFORMER. — Failure to keep a transformer in repair, thereby allowing a current of 2,000 volts to enter premises instead of 104 volts, resulting in the death of plaintiff's intestate from contact with incandescent light, constitutes negligence.
2. ASSUMPTION OF RISK. — Plaintiff's intestate did not assume the risk of injury resulting from the unauthorized and unexpected discharge of 2,000 volts when the defendant had agreed to furnish only 104 volts.

CONTRIBUTORY NEGLIGENCE. — Where it appears that a current of 104 volts is harmless, even to one standing on a wet floor, plaintiff's intestate cannot be said to have contributed to the defendant's negligence in sending 2,000 volts into the premises.

Petition of defendant for new trial. *Granted.*

Before TILLINGHAST, DUBOIS, and BLODGETT, JJ.

P. Henry Quinn, David S. Baker, and *Lewis A. Waterman,* for plaintiff.

Vincent, Boss & Barnefield, and *Edward D. Bassett,* for defendants.

Opinion by BLODGETT, J.:

This is an action on the case for the recovery of damages for the death of the plaintiff's intestate, Thomas E. McCabe, her late husband, on September 16, 1903, from an electric shock, alleged to have been caused by the negligence of the defendant. At the trial the jury returned a verdict for the plaintiff for the sum of $19,000, and the case is now before us on the defendant's petition for a new trial.

Briefly stated, the undisputed facts are as follows: The plaintiff's intestate was at the time of the accident the proprietor of a stable at Riverpoint, and in the month of August his premises had been wired for electricity, which was furnished by the defendant corporation. The company sent out from its station in Providence a current of 2,000 volts, which was stepped up or converted by transformers into 11,000 volts, and was carried at that voltage to the substation at Apponaug, and then at the substation at Apponaug it was stepped down again or transformed into 2,000 volts, and at that voltage was sent throughout the town of Warwick and the Pawtuvet Valley; and, when it was desired to send the electricity into a building for the purpose of lighting incandescent lights, it would be further converted by a transformer into a current of 104 volts, and thus delivered to their customers, of whom McCabe was one. The entire building had been wired, and the light which caused the trouble was located in the washroom of the stable. On the evening of September 16th, at about 8.45 P. M., one McMann went to the stable to get a board. To get this board, McCabe went to the washroom, by the door of which stood McMann. What happened next is thus told by the

latter: "Q. 6. What happened? A. Well, he went in there to get a board for me. I had a window broken in my barber shop that night, and, as I say, he went in to get a board — into this storeroom; and by going through the washroom — There was a light hanging there, and he went to turn this light on. He reached up to turn the light on, and as he did I saw a spark come out of one of his hands — I don't remember which — and he made a grunt, 'Oh!' and lay there on the wire. I hollered to turn the switch off — to my brother." Peter Massie was also with McMann when the accident happened. He testifies: "When he turned the light on he got hold of the wire to take a knot out, to work in the back room with it; and as he did I saw a blue flame coming out of his arm, and I grabbed hold of him to pull him away, and as I did so I got a shock." At the time of the accident the transformer which was used to reduce the current to 104 volts for the McCabe stable and a few other buildings in the immediate vicinity had burned out, which resulted in letting the alternating current of 2,000 volts into the wiring of the stable. This condition was not known to the defendant company or to any one prior to the accident to McCabe. A transformer, such as the one in this case, is made up of two coils of insulated wire, one coil having twenty times as many turns of wire as the other coil. The coil with the greater number of turns is connected with the high voltage or "primary" wires which come from the substation at Apponaug to the transformer, and the other coil is connected with the low voltage or "secondary" wires which run from the transformer to the interior of the building lighted. These two coils are not connected, but are very carefully insulated from each

plaintiff's intestate had contracted to receive, a current of only 104 volts, and that the premises in question were property wired and insulated for a current of that voltage. Neither was it disputed that a current of not more than 300 volts is harmless, that death cannot be caused by a current of less than 500 volts, and that the shock which caused the death of McCabe was approximately 2,000 volts. It was not denied that the transformer from which the current entered McCabe's premises was made in 1893; that it was never inspected by the defendant after having been placed in position; that there were no lightning arresters in this vicinity, no fuses, nor grounding of the secondary wires; that the oil requisite for the proper action of the transformer had not been kept replenished; and that the transformer was originally made for an alternating current of 125 cycles, which had been changed to a current of sixty cycles, thereby impairing the efficiency of the transformer; and, even more than this, that, whereas approximately twenty lamps were what is technically termed a proper "load" for a transformer of such a type, yet here more than sixty lamps were supplied from this transformer, of which lamps, on an average, practically thirty were simultaneously in use at night.

It would serve no useful purpose to recite all the testimony in detail upon these points, and we are content to say that all these facts are abundantly established by the evidence, and many of them are so established from the lips of the witnesses for the defense. Thus the testimony of the witness Fenner, the superintendent of the defendant's lines in the territory in which McCabe's premises were located, is as follows: "C-Q. 74. You had there an old transformer? A. Yes, sir. C.-Q. 75. No grounds? A. No, sir. C.-Q. 76. No fuses? A. No, sir. C.-Q. 77. No lightning arresters in that vicinity? A. No, sir." And the testimony of James E. Cole, an engineer with eighteen years' experience in electrical affairs, the chief inspector of the engineering department of the city of Boston, called by the defendant as an expert witness, upon cross-examination, was thus given: "C.-Q. 130. If this transformer was kept filled with oil, would it have been as apt to burn out? A. No, sir. C.-Q. 131. From any source? A. No, sir. C.-Q. 132. Would you say it was a good practice to put upon that transformer — a one hundred twenty-five cycle transformer — sixty-four lights, over thirty of which were lighted

continuously almost every evening? A. As you state it, no sir. C.-Q. 133. That would be apt to weaken the transformer? A. Yes, sir; it would. C.-Q. 134. So it would more easily burn out? A. It would. C.-Q. 135. The secondaries — grounding them is the best means of preventing too great a current from going into a building over the secondary wires, is it not? A. I think I know what you mean, and I will answer it the way you mean. It is the best way I know of. C.-Q. 98. Now, are fuses in common use on transformers? A. They are. C.-Q. 100. They are in use by all electric lighting companies, are they not? A. No, sir. C.-Q. 101. Practically all, so far as you know? A. Yes, sir. C.-Q. 102. And you think it is something that should be there? A. I do. C.-Q. 103. And it helps to save the transformer? A. It does. C.-Q. 104. It helps to keep it from burning out? A. It does. C.-Q. 109. Lightning arresters were in common use in 1903? A. They were. C.-Q. 110. Very common use? A. Fairly common; yes, sir, very common. C.-Q. 114. Was there any material difference of opinion in the year 1903 as to the grounding of secondaries, as a means of safety to life? A. I do not know. C.-Q. 115. Do you think so? A. I think that probably a majority were in favor of grounding them at that time. C.-Q. 116. The vast majority, were they not? A. I should not say vast. I should say the greater majority. C.-Q. 117. The fire underwriters recommended it? A. Permitting and recommending it; yes, sir. C.-Q. 118. And this electric association, say back in 1889, recommended it? A. In their final report they did; yes, sir. C.-Q. 119. Away back in 1899? A. Yes, sir." And the testimony of the witness William C. Woodward, the electrical engineer for the defendant for the last four years, is as follows, upon cross-examination: "C.-Q. 140. Now, what inspection of your transformers do you have? A. After they are placed in shape? None. C.-Q. 141. Absolutely none? A. No, sir. C.-Q. 142. They are left there until they burn out? A. Until they are removed for some cause. C.-Q. 143. Until some customer says there is trouble with their line, or when a man has been killed? A. When a report of trouble comes it is investigated, and, if the transformer is faulty, it is removed. C.-Q. 144. But up to that time no inspection is made, and it may consist of trouble with the light, or some complaint of somebody having had a shock? A. It may. C.-Q. 162. In

October, 1903, didn't you testify that the grounding of the transformer is the only device and the best device to save human life? A. I did." And finally, the testimony of the witness Walter R. Eaton, an electrical engineer for eighteen years for the Electric Lighting Company of Cambridge, Mass., called by the defendant as an expert, upon cross-examination as to the alleged overloading of the transformer supplying the McCabe premises, and which was conceded to be a twenty-light transformer, is as follows: "C.-Q. 38. If the saloon had eight lights, the barber shop had three, and in addition to that there was a hosehouse which was lighted all the evening, every evening five lights, a livery stable which had five or six lighted every evening — that makes a total of twenty-one or twenty-two — and in addition to that there was a residence with nineteen lights, and another residence and an office with twenty-five lights, and a barn with two lights, how many light transformers would you say it would take to supply that number of lights? A. I should put up a fifty-light transformer. C.-Q. 39. Would that supply if the transformer was a one hundred and twenty-five cycle? A. Yes, sir. C.-Q. 41. And you would have a sixty-cycle current on it? A. Yes, sir."

The third and fourth grounds are as follows:

"Third. Because the testimony shows that the plaintiff's intestate assumed the risk of the injury. Fourth. Because the testimony shows that the plaintiff's intestate was guilty of contributory negligence."

To these it is sufficient to reply that he did not assume the risk of injury resulting from the unauthorized and unexpected discharge of a current of 2,000 volts, when the defendant had agreed to furnish him a current of but 104 volts. Inasmuch as the evidence is not disputed that a current of but 104 volts was harmless, even to use standing on a wet floor, McCabe cannot be said to have in any way contributed to the defendant's act in sending a current of 2,000 volts into his premises.

The fifth and sixth exceptions are as follows:

"Fifth. Because the court erred in permitting the witness Duffy to testify as a general expert in electrical matters. Sixth. Because the court erred in permitting the witness Duffy to testify as to the custom of hanging lights, in answer to question 193, page 48, of the record."

We are of the opinion that the witness was sufficiently qualified to express an opinion upon the matters in question. And we here observe that the record shows an abundance of evidence, to the

same effect as the testimony given by Duffy, from expert witnesses whose qualifications were and are unquestionable.

The seventh exception is as follows:

"Seventh. Because the court erred in permitting the expert witness William L. Robb to testify regarding the recommendations of the American Institute of Electrical Engineers, in answer to question 232, page 97, of the record."

As an answer tending to show the familiarity of the witness as an expert with the condition of the art, as theoretically stated by a body of scientists engaged in the investigation of the practical application of electricity to the affairs of human life, we think the question was a proper question, and overrule the exception.

The eighth ground of exception is not pressed.

The ninth ground of exception was the alleged error of the court in refusing to charge:

"If the light was installed under the direction of plaintiff's intestate, and such installation was dangerous and contributed to the accident, then the plaintiff's intestate was responsible for the result of such faulty installation."

It is sufficient to say that the evidence indubitably showed that the premises were wired and insulated for a current of only 104 volts, and that for that purpose they were properly wired and insulated, and that the premises in question were not wired and insulated, or intended or designed, for a current of 2,000 volts. It accordingly follows that the instruction in question should have been denied, as irrelevant to the issues and the testimony as presented.

resembles in this respect the case of *Schnable v. Providence Public Market,* 24 R. I. 478; 53 Atl. 634, which was an action by a father for damages for the loss of service by reason of the wrongful death of his minor son. Obviously, then, when the fact of liability is established, the question of damages becomes as nearly a question of arithmetical computation as the circumstances of the case as disclosed by the evidence will permit; and consequently the rule of damages differs from that which obtains in other tort actions — such, for example, as slander, libel, assault, and false imprisonment. It is obvious, too, that the loss sustained by the plaintiff here is the present value of the net result remaining after his personal expenses are deducted from his income or earnings. To ascertain this, it is, of course, necessary to ascertain first the gross amount of such prospective income or earnings; then to deduct therefrom what the deceased would have to lay out, as a producer, to render the service or to acquire the money that he might be expected to produce, computing such expenses according to his station in life, his means and personal habits; and then to reduce the net result so obtained to its present value. *Central Railroad v. Rouse,* 77 Ga. 393, 3 S. E. 307; *Harrison v. Sutter Street Railway Co.,* 116 Cal. 156, 47 Pac. 1019; *Ohio & Mississippi Railway Co. v. Voight,* Adm., 122 Ind. 288, 23 N. E. 774. In the case at bar there was no evidence offered for the consideration of the jury as to such personal expenses of the deceased; and even if it be conceded that the amount awarded was justified by the evidence as the gross amount of the prospective income of the deceased, on which we express no opinion, it follows that this result must have been reached by the jury, even if uninfluenced by the observations of the plaintiff's counsel in his argument, without the presentation of evidence as to the personal expenses of the deceased, as above stated, and hence is incorrectly reached.

The liability of the defendant corporation in this case being clearly established by the evidence, we are of the opinion that both parties are entitled to the benefit of the judgment of a jury upon the amount of damages sustained, which are to be competent according to the rule above laid down. The case will therefore be remitted to the common pleas division for a new trial upon the single question of the amount of damages to which the plaintiff is entitled.

MEEHAN v. HOLYOKE STREET RAILWAY CO.

Massachusetts Supreme Judicial Court — Oct. 18, 1904.

186 Mass. 511, 72 N. E. 61.

1. INJURY TO ELECTRIC LINEMAN — ASSUMPTION OF RISK — DUTY TO INSTRUCT. — An electric lineman employed by an electric street railway company was injured while assisting in the adjustment of a cable on the arm of a pole erected for that purpose. While so engaged he stood upon the platform of a tower wagon, just underneath the arm on which the cable rested, with one foot on the brace supporting the arm and the other foot on the rail attached to, but two feet higher than, the platform; he took hold of the arm with his left hand and grasped the cable with his right to help lift it over the inner pin so that it could be set in the groove of the insulator on the outside pin and tied. It was held that the nature of the work did not require that he be instructed as to the best method of performing it; that since the plaintiff had been employed for several weeks in placing such cables along the line of the defendant's tracks and was familiar with the method of performing the work, he is chargeable with knowledge, and must be presumed to have realized and appreciated any danger incidental to the process, and to have assumed the risks of his employment.
2. EXPERT TESTIMONY. — The process of stringing a cable wire on the arms of poles erected for that purpose is so plain and simple that it is well within the scope of common observation and knowledge, and is not a subject in respect to which opinion evidence or expert testimony is admissible.

Exceptions by plaintiff to verdict directed in favor of the defendant. *Overruled.*

R. P. Stapleton and *Wm. H. McClintock,* for plaintiff.

[redacted]

But to find the defendant liable for a failure to give proper uctions the danger must have been such that the plaintiff d be presumed to have been ignorant of it. There were no aled risks, and whatever danger there was arose from the bility of falling, while handling the wire, from the place e he was required to work. Neither was he being urged in ork so that it could fairly be claimed that his attention was icted by such a command, and on which he would have a right ly as a possible excuse that would relieve him from the impu- n of negligence. It appears that when the cable was firmly n and ready to be adjusted the order was given to the plaintiff help * * * lift the wire over." To do this he knew it would be necessary for him to stand on the platform of the wagon, which was just underneath the arm on which the rested, and from this position he then voluntarily placed elf with one foot on the brace which supported the arm on side of the pole and the other foot on the rail attached to, wo feet higher than, the platform, and while taking hold of rm with his left hand he grasped the cable with his right hand lp lift it over the inner pin so that it could be set in the groove e insulator on the outside pin and tied. He also must have n something of its weight and the strain to which it was sub- l, for he had helped to place it in position upon the top of rm; and the fact that at this point of the line, and nearly at a angle with its former course, there was a sharp turn in the tion in which the cable was to be extended, and which might it more difficult of attachment to the arm, was a matter of ion observation. The physical requirements of his work did revent him from releasing his grasp, nor was he required by rder, or from the nature of his employment, to retain it, when doing his personal safety might be put in peril. If the cable ufficiently slackened, it was plainly apparent that its weight l be likely to cause it to fall; and in taking the position as- d by him he could easily have perceived that if, from any , the cable was not held securely until fastened to the pin, uld recoil, and, if he then retained his grasp, he might be n to the ground. As all these conditions were open and e, no instructions at this time would have afforded to him urther information as to the nature of the work, or the way

MEEHAN v. HOLYOKE STREET RAILWAY CO.

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Exceptions by plaintiff to verdict directed in favor of the defendant. *Overruled.*

R. P. Stapleton and *Wm. H. McClintock,* for plaintiff.

Brooks & Hamilton, for defendant.

Opinion by BRALEY, J.:

The plaintiff rests his right to recover on the ground that the defendant's negligence consisted either from putting him to work in a dangarous place without warning him of the danger to which he was exposed, or in moving the wire by an improper method. We assume, in our decision of the case, there was evidence for the consideration of the jury that Connors was intrusted with and exercised superintendence over the plaintiff at the time of the accident. *Knight v. Overman Wheel Co.,* 174 Mass. 455, 54 N. E.

Expert Evidence. — See *Citizens Telephone Co. v. Thomas, post,* and note thereunder.

890. But to find the defendant liable for a failure to give proper instructions the danger must have been such that the plaintiff would be presumed to have been ignorant of it. There were no concealed risks, and whatever danger there was arose from the possibility of falling, while handling the wire, from the place where he was required to work. Neither was he being urged in his work so that it could fairly be claimed that his attention was distracted by such a command, and on which he would have a right to rely as a possible excuse that would relieve him from the imputation of negligence. It appears that when the cable was firmly drawn and ready to be adjusted the order was given to the plaintiff "to help * * * lift the wire over." To do this he knew that it would be necessary for him to stand on the platform of the tower wagon, which was just underneath the arm on which the cable rested, and from this position he then voluntarily placed himself with one foot on the brace which supported the arm on that side of the pole and the other foot on the rail attached to, but two feet higher than, the platform, and while taking hold of the arm with his left hand he grasped the cable with his right hand to help lift it over the inner pin so that it could be set in the groove of the insulator on the outside pin and tied. He also must have known something of its weight and the strain to which it was subjected, for he had helped to place it in position upon the top of the arm; and the fact that at this point of the line, and nearly at a right angle with its former course, there was a sharp turn in the direction in which the cable was to be extended, and which might make it more difficult of attachment to the arm, was a matter of common observation. The physical requirements of his work did not prevent him from releasing his grasp, nor was he required by any order, or from the nature of his employment, to retain it, when by so doing his personal safety might be put in peril. If the cable was sufficiently slackened, it was plainly apparent that its weight would be likely to cause it to fall; and in taking the position assumed by him he could easily have perceived that if, from any cause, the cable was not held securely until fastened to the pin, it would recoil, and, if he then retained his grasp, he might be thrown to the ground. As all these conditions were open and visible, no instructions at this time would have afforded to him any further information as to the nature of the work, or the way

in which it was to be performed, that he did not already possess, and the defendant owed no duty to instruct where instructions were unnecessary. *Downey v. Sawyer,* 157 Mass. 418, 32 N. E. 654; *Stuart v. West End St. Ry. Co.,* 163 Mass. 391, 393, 40 N. E. 180.

Under the second claim of liability the plaintiff argued that he had a right to have this issue submitted to the jury. If some other way than the simple process finally used to place the cable in position would have been better and more safe, yet the plaintiff had been assisting in putting up the cable for more than two weeks before the accident, and during this time about three miles of wire had been strung, and his testimony discloses that he was substantially familiar with the manner in which it was raised and attached to the arms of the poles, and there is nothing to show that the method employed to adjust it to the arm of this pole differed from that previously followed. The acting superintendent was using a method already in use by the defendant, and with which the plaintiff was familiar; and, if he considered the way in which the work was being done unsafe, he was not obliged to continue in its employment as a lineman, but, if he chose to go on, he accepted that way with whatever risk attached to it. *Goodes v. B. & A. R. Co.,* 162 Mass. 287, 288, 38 N. E. 500. Although he also testified he was not told and that he did not know it was dangerous to move the cable from one pin to the other, yet under the circumstances he cannot be excused in the exercise of ordinary care from being chargeable with such knowledge, and must be presumed to have realized and appreciated any danger incidental to the process. *Moulton v. Gage,* 138 Mass. 390; *Lothrop v. Fitchburg R. Co.,* 150 Mass. 423, 425, 23 N. E. 227; *Goldthwait v. Haverhill & Groveland St. Ry. Co.,* 160 Mass. 554, 556, 36 N. E. 486; *Sullivan v. Simplex Electrical Co.,* 178 Mass. 35, 59 N. E. 645; *Lodi v. Maloney,* 184 Mass. 240, 68 N. E. 229; *Gavin v. Fall River Automatic Tel. Co.,* 185 Mass. 78, 69 N. E. 1055.

The remaining exception relates to the exclusion of the evidence of a witness called by the plaintiff, who from his large experience in stringing, moving, and repairing similar wire, was asked to give his opinion of what would be the proper way to move the cable, and whether the method adopted was improper. Even if it is conceded that the witness was qualified to give an opinion, this

evidence was excluded properly. Where the issue to be tried involves technical or mechanical knowledge not commonly understood, such evidence is admissible to enable a jury to draw correct inferences, and to form a reliable judgment of the effect of the testimony; but the process of stringing a cable wire on the arms of poles erected for that purpose is so plain and simple that it is well within the scope of common observation and knowledge, and can be intelligently comprehended by a jury without the aid of opinion evidence. *Oliver v. North End St. Ry. Co.,* 170 Mass. 222, 49 N. E. 117; *Flynn v. Boston Electric Light Co.,* 171 Mass. 395, 50 N. E. 937; *Edwards v. Worcester,* 172 Mass. 104, 51 N. E. 447; *Spillane v. Fitchburg,* 177 Mass. 87, 58 N. E. 176, 83 Am. St. Rep. 262.

As the plaintiff has failed to prove any act of negligence on the part of the defendant, his exceptions must be overruled. So ordered.

REYNOLDS v. NARRAGANSETT ELECTRIC LIGHTING CO.

Rhode Island Supreme Court — Oct. 28, 1904.

26 R. I. 457, 59 Atl. 393.

1. TRANSFORMER — RES IPSA LOQUITUR. — A transformer, being wholly under the control of an electric light company, its breaking down or functual derangement is inferentially evidence of negligence, thus casting upon the company the burden of rebutting the same.
2. SAME — DEATH FROM INCANDESCENT LIGHT — EVIDENCE. — In an action to recover for death caused by shock received while turning on an incandescent electric light, evidence that the transformer which failed was made by a reputable manufacturer is insufficient to rebut the presumption of negligence, where it is not shown: How long it was in service? What was its condition at the time of its installation?
3. WIRING OF BUILDING. — It is not necessary, in the ordinary wiring of a building for incandescent electric lighting, and in the arrangement of lamps therein for that purpose, to anticipate and prepare for the access of dangerous or deadly currents upon the failure of apparatus wholly under the control of an electric lighting company.
4. GROUNDING OF SECONDARY WIRES — INSTRUCTIONS. — A requested instruction that "it would not be negligence for the defendant to omit the grounding of the secondary wires, if they were not permitted to do so," was properly refused as being too broad.

Wiring of Buildings for Electric Lights. — See *Herzog v. Municipal Electric Light Co., ante,* and note thereunder.

5. INTERIOR WIRING — INSTRUCTIONS. — An instruction that "the defendant had the right to assume that the interior wiring was properly done, and that the lamps in the altar were placed and arranged in a manner that would insure the greatest degree of safety," is too broad. An electric light company has the right to assume that the interior wiring has been properly done.

Petition by defendant for new trial. *Granted* for assessment of damages.

Before STINESS, C. J., and TILLINGHAST and DUBOIS, JJ.

David S. Baker and *Lewis A. Waterman,* for plaintiff.

Walter B. Vincent, for defendant.

Opinion by DUBOIS, J.:

This is an action of the case, brought by the widow and next of kin of Nathaniel T. Reynolds, deceased, to recover damages for his death, which is alleged to have been caused by the wrongful act, neglect, and default of the defendant. The deceased was killed in the cellar of the Masonic building, in East Greenwich, R. I., while attempting to turn on an incandescent electric light, by an electric current furnished by the defendant, who caused it to enter a transformer, outside of the building in an alternating current of about 2,000 volts, for the purpose of being there transformed into a current of about 104 volts before entering the building. The accident occurred through a burning out, breaking down, or other weakened condition of the transformer, which incapacitated it from doing its work, with the result that, instead

failed was made by a reputable manufacturer. But the questions: Who purchased it, and when? How long was it in service, and what was its service? What was its condition at the time of its installation at the place where it gave out? Was it worn out, or suddenly disabled? Was it ever inspected after its last installation? — and others as pertinent remain unanswered. We are led to the conclusion that the jury were right.

As to the alleged errors of the court:

The defendant requested the court to charge: "The defendant was not responsible for any accident occurring from defects in the interior wiring or arrangement of lamps, if that work was not done by defendant, and the defendant had no control over it." The court so charged, but added: "Unless the defendant was also guilty of negligence in the outside wiring, or in its connection with the inside wiring." We see no error. Interior wiring for and arrangement of incandescent lamps sufficient to safely carry 104 volts of electricity cannot be considered defective simply because they could not control nearly twenty times that force or amount. It is not necessary, in the ordinary wiring of a building for incandescent electric lighting, and in the arrangement of lamps therein for that purpose, to anticipate and prepare for the access of dangerous or deadly currents of electricity through its wires subsequent upon the failure of apparatus wholly under the control of an electric lighting company. The installer of an interior electric lighting incandescent plant is not an insurer against accidents caused by the imposition upon it of burdens beyond its control, and far in excess of its normal capacity. There was no evidence tending to show that the accident occurred in consequence of defects in the interior wiring or arrangement of lamps, and so the request could well have been refused; but, as given, there is no valid objection to the modification.

The second request to charge, as modified, is substantially similar to the first, and for the same reasons we find no error.

The fourth request to charge, refused by the court, was as follows: "It would not be negligence for the defendant to omit the grounding of its secondary wires, if the desirability of such grounding, as a means of safety, was in dispute among electricians." It was not error upon the part of the presiding justice

to refuse this request. The court had sufficiently charged the jury upon that point.

The defendant's fifth request to charge that "it would not be negligence for the defendant to omit the grounding of the secondary wires, if they were not permitted to do so," was properly refused by the court. The request as framed was too broad.

The seventh request of the defendant to charge, "The defendant was not responsible for the action of lightning upon the transformer, and was not bound to employ a doubtful or disputed means for preventing an increased voltage upon the interior wires," was properly refused by the court, who had correctly stated the law upon this point in his charge to the jury. A judge may well refuse to give undue emphasis to one portion of his charge over another in the form of requests to charge.

The defendant also requested the court to charge: "The defendant had the right to assume that the interior wiring was properly done, and that the lamps in the cellar were placed and arranged in a manner that would insure the greatest degree of safety." This request was rightly refused. The rule attempted to be laid down is altogether too broad. The defendant had the right to assume that the interior wiring was properly done, and that the lamps in the building, including those in the cellar, were properly placed, and arranged in a manner that would with reasonable safety receive and use an electric current of about 104 volts.

The seventh objection is that the alleged special question propounded to the jury is not a question at all, and the answer of the

in this. Standard life and annuity tables, showing at different ages the probable duration of life and the present value of a life annuity, have been held to be competent evidence. *Vicksburg, etc., R. Co. v. Putnam,* 118 U. S. 554, 7 Sup. Ct. 1, 30 L. Ed. 257; *Sauter, Adm'r, v. N. Y. C. & H. R. R. Co.,* 66 N. Y. 50, 23 Am. Rep. 18; *Copson v. N. Y., N. H. & H. R. R.,* 171 Mass. 233, 50 N. E. 613.

The defendant also claims that the damages awarded are excessive. The amount awarded is $18,500. The decedent's age at the time of his decease was fifty-one years, and up to the time of his death he was in perfect health, and was a man of unusual activity. His expectation of life, according to the actuaries' table, was 19.50 years, and, under the American experience table, 20.02 years. Thus he had every expectation of reaching the scriptural limit of three score years and ten. Can we say that the jury overvalued such a life? We must assume that the verdict of the jury was based upon the evidence, and was reached by a proper application of the rule governing the measure of damages in such cases. The rule as stated in the case of *McCabe, Adm'x, v. Narragansett Electric Lighting Company* (recently decided by this court), 59 Atl. 112, is to ascertain first the gross amount of the prospective income or earnings of the deceased, then to deduct therefrom what he would have to lay out, as a producer, to render the service or to acquire the money that he might be expected to produce, computing such expenses according to his station in life, his means and personal habits, and then to reduce the net result so obtained to its present value. In other words, to find his net income or earnings from facts in evidence, and not by guesswork, in order to apply the annuity tables thereto and ascertain its present value. There was no evidence offered in this case to the jury as to such personal expenses, and therefore the jury were deprived of its aid in reaching a verdict. We are of the opinion that the parties hereto are entitled to the benefit of the judgment of a jury upon the amount of damages sustained, to be computed in accordance with the foregoing rule.

Case remitted to the Common Pleas Division for a new trial solely upon the question of the amount of the plaintiff's damages.

HOBOKEN LAND & IMPROVEMENT CO. v. UNITED ELECTRIC CO. OF NEW JERSEY.

New Jersey Supreme Court — Nov. 7, 1904.

71 N. J. L. 430, 58 Atl. 1082.

ELECTRIC LIGHT COMPANIES — DUTY TO INSPECT APPARATUS INSTALLED BY OTHERS BEFORE TURNING ON CURRENT. — An electric company, before sending its current for lighting purposes through the apparatus installed in a building by other parties, is bound on its own responsibility to make reasonable inspection of the apparatus to see whether it is fit for use. (Syllabus by the Court.)

Rule to show cause on verdict for plaintiff. *Rule discharged.*

Before the CHIEF JUSTICE and HENDRICKSON, PITNEY, and DIXON, JJ.

Edward A. Day, for plaintiff.

Bedle, Edwards & Thompson, for defendant.

Opinion by DIXON, J.:

In May, 1900, Verdon applied to the North Hudson Light, Heat & Power Company to install an electric meter in the saloon of which he was tenant on the corner of Fourteenth and Hudson streets, in Hoboken, for the purpose of furnishing him with light. The company contracted with an independent and competent electrician to install the meter, and he did so on June 9, 1900. The company began at once to supply the electric current, and on July 19, 1900, a fire started in the meter box and damaged the

negligence against the electric company for transmitting its current through the defective apparatus.

At the trial in the Hudson Circuit the presiding justice instructed the jury that three propositions must be established in order to warrant a recovery by the plaintiff: First, that the electrician failed to make a proper connection between the feed wire and the binding post; second, that the fire resulted from the improper connection; and, third, that between the time when the meter was installed and the time of the fire the company should have discovered and remedied the defect. Under these instructions a verdict for the plaintiff was rendered, the propriety of which is now in question.

Respecting the first two propositions submitted to the jury there can be no dispute. Evidently they were essential to the plaintiff's claim, and there was testimony supporting the finding of the jury regarding them. But the third proposition is, on the evidence, open to debate. There was at the trial no evidence tending to show that during the forty days which elapsed between the installation of the meter and the fire anything occurred to suggest a defect in the apparatus, or that in so short an interval the apparatus, if properly installed, was likely to become defective, or that there was any usage of electric light companies to inspect the work of independent electricians before transmitting their current through it. Under these circumstances negligence on the part of the company could be predicated only on the general hypothesis that the company was not justified in assuming that the independent contractor had properly done his work, but was charged with a direct responsibility regarding the exercise of due care and skill in the preparation of the apparatus for use. The question before us is, therefore, was it lawful to permit the jury to base a verdict on that hypothesis? An electric current sufficiently powerful to furnish light is so dangerous to persons and property that, if introduced into a building, and not controlled, it would ordinarily be deemed in law a nuisance. As such it would render the party introducing it responsible for all damage done by it, without regard to the degree of care and skill exercised, and even though the fault of an independent contractor had permitted the defect through which the damage resulted. *Cuff v. Newark & N. Y. R. R. Co., 35 N. J. Law, 17,* 10 Am. Rep.

205; *Id.*, 35 N. J. Law, 574. But in the case of a corporation organized under our statutes (P. L. 1896, pp. 277, 322) to supply electricity for light, heat, and power this responsibility must be modified, for the production of the current is thus legalized, and hence cannot be regarded as *per se* a nuisance. *Beseman v. Pennsylvania R. R. Co.*, 50 N. J. Law, 235, 13 Atl. 164; *Id.*, 52 N. J. Law, 221, 20 Atl. 169. This modification, however, should go no further than is necessary to bring the rule of responsibility into harmony with the legislation. *Salmon v. Delaware, L. & W. R. R. Co.*, 38 N. J. Law, 5, 20 Am. Rep. 356. There is nothing in the statutes which need relieve these companies from responsibility for the exercise of due care and skill in the introduction of their current, and since, outside of the statutes, that responsibility would rest directly upon the party using such an agency, notwithstanding the intervention of an independent contractor, there appears no reason why it should not still be considered an inevitable obligation. It is a general doctrine of the law that, where there is a direct personal obligation imposed upon a party, that obligation cannot be evaded by employing some one else to fulfill it. Actual fulfillment is necessary. *Hole v. S. S. Railway Co.*, 6 H. & N. 488; *Marvin Safe Co. v. Ward*, 46 N. J. Law, 19, 25; *Khron v. Brock*, 144 Mass. 516, 11 N. E. 748; *Steamship Company v. Ingebregsten*, 57 N. J. Law, 400, 31 Atl. 619. These considerations lead to the conclusion that the electric company was bound to exercise due care and skill either in installing the apparatus by its own agents or in examining to see that it had been properly installed by others. The New York Court of Appeals enforced this doctrine in *Schmeer v. Gas Light Co.*, 147 N. Y. 529, 42 N. E. 202, 30 L. R. A. 653, where it was held that the defendant was required, before it permitted gas to be turned into pipes newly installed by other parties, to exercise reasonable care and skill in inspecting the pipes so as to ascertain whether they were in proper condition for use. The application of that doctrine to the case in hand sustains the verdict, for the evidence warranted the jury in finding that reasonable inspection of the apparatus, as it was left by the electrician, would have discovered the loose wire in the binding post, and reasonable care and skill would have remedied the defect at once.

The rule for a new trial should be discharged.

CENTRAL ELECTRIC CO. v. STREET LIGHTING DISTRICT NO. 1 OF WOODBRIDGE TP.

New Jersey Supreme Court — Nov. 7, 1904.

71 N. J. L. 403, 58 Atl. 1080.

CONTRACT FOR STREET LIGHTING — ACTION FOR COMPENSATION. — An electric lighting company furnished electric current for street lighting under a written contract. The defense was that the lights were not of the power required by the contract. It appeared that, after the tests upon which the defense relied were made, the defendant paid for the lights furnished up to the ensuing first of January at the full contract rate. It did not appear that any objection as to the character of the lights furnished thereafter was made by the defendant; and there was no proof of subsequent tests during the existence of the contract. Two of the three lighting commissioners testified that the contract was satisfactorily performed.

Held, that it was error to refuse to charge that the plaintiff could recover under the common counts in assumpsit.

(Syllabus by the Court.)

Rule to show cause on verdict for defendant. *Rule made absolute.*

Before GUMMERE, C. J., and GARRISON and SWAYZE, JJ.

Neilson Abeel, for plaintiff.

Malcolm MacLear, for defendant.

Opinion by SWAYZE, J.:

This action was brought to recover compensation for lighting the streets of Woodbridge. The declaration contained a count upon a contract in writing, a copy of which was annexed to and made part of the declaration, and also the common counts *in indebitatus assumpsit.* By the written contract the plaintiff agreed to erect, maintain, and operate for the term ending with the first Tuesday in June, 1903, 156 or more incandescent street lamps, of 25 candle power each; and the defendant, in consideration of the fulfillment by the party of the first part of the covenants, terms, and conditions of the contract, agreed to pay $16 per lamp per year. There was a provision that the plaintiff should use due care and diligence to cause each lamp to be lighted, and kept continuously lighted, and, in case any lamp should fail to burn, the plaintiff should forfeit ten cents per lamp per night, and a further provision for a *pro rata* reduction for each useless or

suspended lamp during the suspension of lighting caused by unavoidable accident or breakage of machinery. The proofs show that the lighting had been paid for to January 1, 1903, and the suit was for the price for lighting from January 1, 1903, to May 31, 1903. The defense was a failure to supply lights of 25 candle power. There was no denial that lights were furnished in accordance with the contract in other respects. The proof was that tests made on November 7, November 14, and November 24, and December 20, 1902, in different parts of the town, showed that the voltage was less than 220 volts; that some 30 lamps which were examined were found to be marked 24 candle power at 220 volts; that 8 lamps were tested and found to give less than 25 candle power at the actual voltage as ascertained by the tests. It does not seem to have been disputed that the lamps would have given a light of 25 candle power with sufficient voltage. The real ground of the defendant's complaint was that the voltage was insufficient. The tests were made by an expert employed by one of the three lighting commissioners, and reports of the result were made to him. He seems not to have called the attention of his fellow commissioners to the alleged defects, and both of them testified that the contract was carried out by the plaintiff to their satisfaction. The case was tried as if the sole issue were whether the plaintiff had fully performed its contract, and the court submitted that question to the jury. The court charged: "If you conclude that this company has not performed its contract — has not furnished light of the power which it agreed to, but has furnished light much less in power — although you may think it harsh, it cannot recover anything." No exception was taken to the charge, but at its close the court was asked to charge that the plaintiff was entitled to recover under the common counts, and this request was denied. There was a verdict for the defendant, and this rule was allowed.

The question we have now to determine is not whether the proper construction of the contract required the plaintiff to furnish merely lamps of 25 candle power, or to furnish a current of sufficient voltage to produce a light equivalent to 25 candles; nor is it whether the plaintiff's agreement in this respect is a condition, the exact and literal performance of which is necessary to justify any recovery whatever. We have merely to decide

whether the light was furnished during the first five months of 1903 under such circumstances that the law will imply a contract to pay what it was reasonably worth. If so, the plaintiff was injured by the refusal to permit a recovery under the common counts. We think the evidence on the part of the defendants indicated either a departure from the terms of the contract, or an acceptance by the lighting commissioners, on behalf of the district, of such performance as the plaintiff was then giving. We base this conclusion upon the fact that the tests were made in November and December, 1902, the results known to at least one of the commissioners, and the contract price thereafter paid to January 1, 1903. The necessary inference is either that the commissioners accepted the performance as a complete performance, or assented to an incomplete performance, and valued it at the contract price. After January 1, 1903, no further tests seem to have been made, and no complaints made to the company of the character of the service. The commissioner who had had the tests made in November and December was not produced as a witness. The company, having received pay at the contract rate for the service rendered in November and December, had the right to assume that they would be paid for the same service during the ensuing months. From the fact that no objection or complaint was made to them by the lighting commissioners, and that two of the three now express their satisfaction with the service rendered, we think it would, to say the least, be a permissiblt inference for a jury that the services were accepted by the defendants, whether they were in compliance with the contract or not. If so, the law implies a contract to pay their reasonable value. *Bozarth v. Dudley,* 44 N. J. Law, 304, 43 Am. Rep. 373; *Feeney v. Bardsley,* 66 N. J. Law, 239, 49 Atl. 443. The lighting commissioners were empowered by statute (Gen. St., p. 3669, pl. 452) to make contracts for the district for maintenance of street lights, and the district can be held on the implied assumpsit. *Wentink v. Freeholders of Passaic,* 63 N. J. Law, 65, 48 Atl. 609.

We express no opinion upon the question whether the tests made in November and December, 1902, by the expert would be sufficient to show a failure of complete and exact performance in the year 1903.

The rule should be made absolute.

NAGLE v. HAKE.

Wisconsin Supreme Court — Nov. 15, 1904.

123 Wis. 256, 101 N. W. 409.

1. INJURY TO INFANT — TELEPHONE WIRE ACROSS ELECTRIC LIGHT WIRE — NEGLIGENCE OF HOUSE MOVER. — In an action to recover for personal injuries suffered by an infant by accidentally coming in contact with a telephone wire, charged with a heavy current of electricity from an electric light wire, the telephone wire having been hung on the side of a house near the ground by a house mover, *held* to be sufficient proof of actionable negligence and of proximate cause to take the case to the jury.
2. SAME — EVIDENCE OF CUSTOM. — Evidence that the telephone and electric light companies each had a man at the building as the defendant was moving it, who took care of the wires, and that this was the general custom, was incompetent where the witness had not shown that he knew anything about a general custom. Evidence to show the individual custom of the defendant was also incompetent.
3. SAME — EVIDENCE. — The striking out of evidence as to whether the telephone wire was fastened to the insulator in the usual way was not prejudicial, for there was a presumption, in the absence of any evidence, that it was fastened in the usual way.

   Evidence of both father and mother of the infant plaintiff that no one told them the wire was dangerous, and that they did not know that it might become dangerous is competent.

   Evidence by an electric engineer as to the voltage carried by the wires, as to the effect of contact between the wires, as to insulation, etc., was competent.
4. SAME — CROSS-EXAMINATION. — Where plaintiffs' witness had testified that the electric light company maintained a wire at a certain place covered with weather proof insulation, it was not proper to ask him on cross-examination whether additional insulation would not be safer, whether there would not be less danger in case of contact with another wire, and whether it was not customary to place guard wires over such wires to prevent contact.
5. CARE IN HANDLING WIRES — INSTRUCTIONS. — An instruction that "The defendant * * * is presumed to have known that it was an electric wire, and to have known and realized the dangerous properties of electricity, and that a higher degree of care was necessary when a thing on account of which an injury may be caused was a highly dangerous one, and that dead electric wires may be enlivened by coming in contact with a charged wire," was proper.

Appeal by defendant from a judgment in favor of plaintiff. *Affirmed.*

Statement of facts by WINSLOW, J.:

This is an action to recover damages for personal injuries suffered by the infant plaintiff by accidentally coming in contact with a telephone wire

charged with a heavy current of electricity. There is very little dispute as to the facts. It appeared by the evidence that the appellant, Hake, was a house mover by occupation, in Milwaukee; that about June 20, 1901, he was moving a building along Walker street, which is a street running east and west on the south side of said city; that an unused telephone wire was stretched across Walker street, belonging to the Julius Andrae & Sons Company, a manufacturing corporation, which wire came from the north and crossed National avenue, another east and west street, one block north of Walker street; that on the north side of National avenue this wire was fastened to a shop building, and on the south side to a bracket upon a pole, and then proceeded along Barclay street south to Walker street; that as this wire crossed National avenue it hung a few inches above an electric light wire heavily charged with electricity, belonging to the Milwaukee Electric Railway & Light Company, protected only with a coating of weather insulation; that the plaintiff was a boy eight years of age, and lived with his parents on the west side of Barclay street, between National avenue and Walker street, and near the latter street; that when Hake reached this wire with his building he cut it, and rolled up the end for some distance in a coil on his arm, and hung the coil on a nail on the south side of the Nagle house, about three and one-half to four feet from the ground, and close to a walk used by the family; that this coil remained so hung up till about June 28, when the plaintiff accidentally touched it as he was standing near the house, and was very severely burned, and received injuries from which he suffered for a long time. It further appeared from the evidence that the wire had sagged down where it crossed National avenue until it rested on the electric light wire, and that the insulation of the latter wire had worn off, so that the telephone wire received the charge of electricity conveyed by the electric light wire. The Julius Andrae & Sons Company was also made defendant originally, but on the trial the action was dismissed as to it.

The jury returned the following special verdict: "(1) Was Arthur Nagle, the plaintiff, injured on June 28, 1901, by receiving an electric shock from a telephone wire left by the defendant, Hake, hanging by the side of the house in which he lived, on Barclay street, in the city of Milwaukee? *A.* (by the Court, by consent of counsel). Yes. (2) Was the plaintiff's injury the natural and probable result of a want of ordinary care on the part of the defendant, William Hake, in breaking, coiling up, and hanging said wire by the side of the plaintiff's house on or about June 21, 1901? *A.* Yes. (3) Ought William Hake, as a man of ordinary intelligence and prudence, in the performance of said act, to have foreseen, in the light of the attending circumstances, that he had done something which would be likely to cause a personal injury of some kind to a person near the age of the plaintiff? *A.* Yes. (4) Ought the defendant, Hake, in the exercise of ordinary care and prudence, to have foreseen, in the light of the attending circumstances, that in cutting, breaking, coiling up, and leaving the telephone wire as he did at the time and place and under the attending circumstances, a personal injury might probably and naturally be caused thereby to some person? *A.* Yes. (5) Did want of ordinary care on the part of the plaintiff's father contribute to produce the injury he received? *A.* No. (6) Did want of ordinary care on the part of plaintiff's mother contribute to produce the injury he received? *A.* No. (7) What sum of money will compensate the plaintiff for his injury? *A.* Twelve hundred and fifty dollars; five hundred dollars to be deducted."

On this verdict the court rendered judgment for the plaintiff, and the defendant appeals.

Hoyt, Doe, Umbreit & Olwell, for appellant.

McElroy & Eschweiler, for respondent.

Opinion by WINSLOW, J.:

The assignments of error are very numerous, and we shall not treat each one separately, but shall endeavor to classify them, and treat each class sufficiently in detail to indicate the conclusions reached on all of the assignments separately.

The alleged errors in refusing to grant a nonsuit, and in refusing to direct judgment for the defendant notwithstanding the verdict, may all be considered and disposed of together.

It is said that there is no proof of actionable negligence, nor of proximate cause sufficient to take the case to the jury. With this we cannot agree. In the present day it is a well-known fact that our streets are full of electric light wires crossing and recrossing each other in every direction, and that some of these wires, especially those transmitting light or heat or power, are charged with deadly currents; and it is also well known that when such a wire is naked, either from having lost its insulation or because necessarily in that condition, like a trolley wire, and comes in contact with another naked wire, the second wire also becomes charged with the current. It requires no college education to know these general facts. Any man actively participating in the affairs of the world, especially in a business which every day necessitates the removal and cutting of such wires, as did the defendant's business, must be presumed to know something of the dangers which lurk ever near the handling of such wires. From the very fact of these known dangers he must necessarily be charged with a higher degree of caution and diligence than one who is dealing with sticks and stones which can convey no such concealed death stroke. As has been said, the defendant was a house mover. His business required the examination and cutting or other disposal of electric wires almost daily. He necessarily must have known something of the dangers lurking about them, and the possibility of contact with a highly charged wire. We think it was certainly for the jury to say whether, in *hanging this* wire on the side of the Nagle house, within reach of

a child, and leaving it there, he was guilty of a negligent act, and an act from which an injury to another was to be anticipated as a natural and probable result.

As stated in the statement of facts, the Julius Andrae & Sons Company was originally joined as defendant in this action on the ground that they were negligent in leaving the unused wire with no one to care for it in the public streets. It appears that after the trial had proceeded for a day or two the plaintiff discontinued the action as to the Andrae & Sons Company, and the defendant, Hake, put the counsel for the Andrae Company on the stand, and examined him as to the circumstances and reasons of the discontinuance. From this examination it appeared that the Andrae & Sons Company paid the father of the infant plaintiff $500, and received a release from the father for the damages claimed by him against the Andrae & Sons Company. It further appeared that no release was given by any one on behalf of the plaintiff for damages suffered by him, nor was any money paid or agreement made by or on behalf of the plaintiff for such a release, but the understanding was that this action should be dismissed, as was in fact done. It further appeared that the dismissal was without prejudice, and that there was nothing to prevent another action being begun by the plaintiff against the Julius Andrae & Sons Company. The defendant, Hake, was allowed to amend his answer by pleading this alleged settlement as a discharge of all claims against him, and claimed that a verdict should be directed on this ground. The court, however, held that the evidence did not show a settlement of the plaintiff's claim against Hake, and instructed the jury that, if they found for the plaintiff, they should deduct the amount paid by the Andrae Company from the amount of the damages found, and this was in fact the course pursued by the jury.

We have been unable to see any error in this; at least any error prejudicial to the appellant. It was competent for the father to settle his own individual claim for damages on account of his son's disablement, and the fact that he does so does not affect the son's separate claim. The evidence did not show that any money was paid to the plaintiff, or to any one on his behalf, on account of his injury, or that any agreement of release, oral or written, was made by the plaintiff, or by any one on his behalf.

The understanding that the present action was to be discontinued constituted no release. It might have been commenced again at once, so far as appears by the evidence. We do not even reach the question of the effect of the release of one of two joint tortfeasors because there has been no attempt made by any one to release the plaintiff's cause of action against either defendant.

Upon the direct examination of the appellant as a witness in his own behalf he stated that the telephone and electric light companies each had a man at the building as he was moving it, who took care of the wires in the street in the way of the building, and either raised them or cut them and put them back again afterwards. He was then asked whether that was the usual custom in moving houses, and also whether, in moving houses, he ever looked after such wires himself; and objections were sustained to both questions. It has not been easy for us to see how the evidence would have been material in any event, but there are very satisfactory answers to the appellant's contention of error on these rulings. As to the first question, the witness had not shown that he knew anything about a general trade custom, and he must show that before he can be heard to testify; and as to the second question, it was only directed to the individual custom of the appellant himself, and this was very clearly incompetent.

A witness named Zarbock, a lineman employed by the Wisconsin Telephone Company, was called as a witness, and testified to examining the wire and its fastenings after the accident, and on cross-examination was asked whether it was fastened to the insulator on the south side of National avenue in the usual way, and an affirmative answer was stricken out. We have been unable to see what substantial bearing this answer would have in the case, or how the striking of it out was in any way prejudicial. The presumption would be, in the absence of any evidence, that it was fastened in the usual way, and this is as far as the answer went. The appellant testified that Mrs. Nagle was present when he hung the wire on the house, and was then asked whether she made objection at that time, and the question was ruled out on an objection. It had before appeared that both the father and mother knew that the wire was hanging there before the injury, the mother having testified that she saw Hake roll it up, and a few minutes later saw it hanging on the house. The fact of their

knowledge of the whole situation is all that is really material on the question of their negligence, and this fact fully appeared. It would not have been made any stronger by showing that no objection was made. Both father and mother were allowed to testify, against objection, that no one told them the wire was dangerous, and that they did not know that it might become dangerous. We see no error in this ruling. If the negligence of the parents is to be imputed to the child (a question which is not decided), it was proper to ascertain what their knowledge was upon the subject of the danger lurking in this wire; not that their statement of ignorance is conclusive, but simply that it is proper to be shown in considering the question of negligence. They may have been negligently ignorant, but this was properly a question for the jury in view of all the facts.

An electrical engineer employed by the Electric Railway & Light Company was allowed, against objection, to answer a number of questions as to the voltage carried by the electric light and trolley wires in Milwaukee, as to the effect of contact between wires, as to the insulation of wires and the absence of guard wires, and other facts tending to show the condition of the various wires in the vicinity at the time of the accident. We are not able to understand how it can be reasonably claimed that there was error in these rulings. The facts thus shown throw light on the general situation and the dangers which were present. Whether the defendant should be charged with knowledge of such dangers, or with negligence in not knowing of them, was a question for the jury.

One of the plaintiff's witnesses who had been called to testify that the Electric Railway & Light Company maintained a wire on the north side of National avenue covered with what is called "weather proof" insulation was asked on cross-examination whether additional insulation would not be safer, whether there would not be less danger in case of contact with another wire, and whether it was not customary to place guard wires over such wires to prevent contact. Objections to these questions on the ground that they were not proper cross-examination were sustained, and, it seems to us, properly. They did not legitimately bear on anything upon which the witness had been examined in chief.

We shall spend no further time upon rulings on evidence.

While there are some other rulings which are complained of, there are none of them of sufficient importance to justify detailed treatment.

The defendant asked that the following instruction be given to the jury, and assigns error on the refusal to give it:

"I further instruct you that if you are satisfied by the evidence in this case that the acts of the defendant Julius Andrae & Sons Company in leaving the telephone wire in question suspended in the manner they did was the proximate cause under the definition and instructions already given you on this subject of the accident to the plaintiff, it is then your duty to answer the question as to whether the acts of the defendant Hake were the proximate cause in the negative."

Another instruction of like tenor, except that it referred to the acts of the Milwaukee Electric Railway & Light Company, was also asked and refused, and exception taken. It is probably sufficient to say with regard to these and several kindred instructions that they express simply the converse of a proposition fully given by the court. The court very carefully defined proximate cause, and charged the jury, in effect, that, in order to find that the negligence of Hake was the proximate cause they must be satisfied of the necessary facts by a fair preponderance of the evidence; otherwise they must answer the question whether the acts of Hake were the proximate cause in the negative. Under the charge no doubt could have been left in the minds of the jury on this proposition, and, such being the fact, it was not error to refuse to give an instruction stating the converse of the proposition.

The court gave the following instruction:

"The defendant, William Hake, in breaking, coiling, and hanging the dead or uncharged wire on June 20, 1901, is presumed to have known that it was an electric wire, and to have known and realized the dangerous properties of electricity, and that a higher degree of care was necessary when a thing on account of which an injury may be caused was a highly dangerous one, and that dead electric wires may be enlivened or become charged with a current of electricity by coming in contact with a charged wire, and that in case any person touched or grasped such a wire it would, or might reasonably be expected to, endanger the life or limbs of any person touching it."

The appellant claims this instruction to be erroneous because it requires the exercise of more than ordinary care. We do not so understand it, nor do we think the jury could have so understood it. The court had already defined ordinary care as "such care as the mass or majority of mankind exercise under the same

or similar circumstances." The sentence now under consideration is elliptical, in that it does not in terms state with what the care required in handling electric wires is to be compared; but we think none could mistake the idea intended, namely, the idea that grater care is required in handling such agencies which may be charged with mysterious and sudden death than in handling ordinary substances, and this as we have seen is a correct statement of the law.

We have covered all of the assignments of error which seem to us to be of sufficient significance to justify special treatment. We have carefully examined the other errors claimed, but have found no errors.

Judgment affirmed.

STONE v. SCHENECTADY RAILWAY CO.

New York Appellate Division, Third Department — Nov. 16, 1904.

99 App. Div. 44, 90 N. Y. Supp. 742.

BREACH OF CONTRACT TO FURNISH ELECTRIC CURRENT — NOTICE TO ATTORNEY CONSTITUTES NOTICE TO CLIENT. — Where an attorney for one of the parties to a contract for electric current, upon making complaint to the other party thereto that the latter has been guilty of a continuing breach of the contract, is informed by such other party that he will direct the immediate discontinuance of such breach, and such order is carried into effect, the attorney's knowledge of the discontinuance of the breach will be imputed to the client and the latter is not entitled to any further notice of such discontinuance.

Appeal by the defendant from a judgment of the Supreme Court in favor of the plaintiff and from an order denying the defendant's motion for a new trial. *Reversed.*

This action is brought for damages for depriving plaintiff of an electric current stipulated for by contract between plaintiff and defendant. The business of the plaintiff was in presenting advertisements at night upon a screen by use of the stereopticon, which he operated by electric power. The purpose for which this power was obtained was known to the defendant at the time the contract was made, or at least soon thereafter. In the contract it was provided that the defendant might cut off the current of electricity

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Breach of Contract to Furnish Current. — See *Wofford & Rathbone v. Buckel Power & Irrigation Co., ante.*

if the bills presented were not paid within ten days after their date. Upon November 3d the first bill was sent to the plaintiff, with a letter saying that if the bill were not paid within three days the electric current would be cut off. The plaintiff having failed to pay the bill within that time, the electric current was cut off, under the protest of the plaintiff. This rendered impossible the use of the stereopticon and the pursuance of plaintiff's business, and thereafter the stereopticon machine which the plaintiff was using was taken away by the owners, from whom he had it under conditional sale. The proof of the damage was to the effect that the plaintiff had twenty-one contracts for the display of advertisements, for each of which he was to receive $10 a month, and that the expense of running the business would be about $950 a year. Plaintiff thus estimated a net income from the year under those contracts of about $1,500. The current remained off until the attorney for the plaintiff interviewed some of the officers of the defendant, whereupon the wires were again connected, and the meter replaced. The trial court charged the jury that they might give the plaintiff damages for the injury to the plaintiff's business for the time during which he was deprived of the use of the electricity for the purpose of using his stereopticon. The jury returned a verdict of $300. From the judgment entered upon this verdict, the defendant appeals. Further facts appear in the opinion.

Before PARKER, P. J., and SMITH, CHASE, CHESTER, and HOUGHTON, JJ.

James A. Van Voast, for appellant.

Loucks & Loucks, for respondent.

Opinion by SMITH, J.:

For the purposes of this appeal the appellant concedes its liability for the breach of the contract. The right to cut off the current only existed after the expiration of ten days from the

to about $1,500 a year, the injury to the business for thirteen days or less would be in the neighborhood of from $50 to $55. From this also should be deducted the amount confessedly owing by the plaintiff to the defendant for electricity furnished, which would bring the amount to which the plaintiff is entitled, in the most favorable view of the evidence, to a sum less than $50.

It is claimed, however, that the plaintiff was not notified when the current of electricity was restored, and that he is entitled to damages from the time the current was cut off until he was notified of the intention of the company to furnish him electricity. It appears, however, that at the time Mr. Veeder, who was acting as the attorney for the plaintiff, made complaint to the defendant, he was taken to the office of Mr. Peck, defendant's general manager. Witness Hanbridge was asked this question: "What did Mr. Peck say? A. He then and there immediately ordered them connected, pending an investigation of the matter." Mr. Peck himself swears that Mr. Veeder came into his office and claimed that an injustice had been done to his client. He then says: "I immediately ordered the meter replaced, pending an investigation. I ordered the wires reconnected." The only inference possible from this evidence is that the order was made in the presence of Mr. Veeder, whose knowledge would be deemed the knowledge of the plaintiff. It was unnecessary to give further notice to plaintiff. It appears, therefore, that, because the jury have failed to give effect to the charge of the court, the judgment and order must be reversed, and a new trial ordered, with costs to appellant to abide the event. All concur; CHESTER, J., in result.

HUDSON RIVER POWER TRANSMISSION COMPANY v. UNITED TRACTION COMPANY.

New York Appellate Division, Third Department — Nov. 22, 1904.

98 App. Div. 568, 91 N. Y. Supp. 179.

1. CONTRACT FOR ELECTRIC CURRENT — SUFFICIENCY OF COMPLAINT IN ACTION TO RECOVER BALANCE DUE. — In an action brought by a power company against a traction company to recover a balance alleged to be due for electric current furnished to the traction company during the month of August, 1903, it appears that the parties had entered into a contract by

the terms of which the power company undertook to furnish the traction company for a period of ten years with a certain amount of electric current for each year for the sum of $70,000 annually, payable in monthly installments.

The contract provided that "if by reason of accident, lack of water, or other matter beyond its control, the power company shall be at any time unable to furnish the electric energy continuously in accordance with the terms of this agreement" compensation for the deficiency should be made by deducting certain specific sums from the monthly payments, which deductions were fixed as liquidated damages for such failure on the part of the power company.

The contract also provided that the power company should also deliver to the traction company all the electrical energy in excess of the amount above required, that the power company could produce at its water-power plant, provided that the traction company should not be obliged to receive in any one day "excess electrical energy" amounting to more than five hundred horse power. Provision was also made for the amounts and times and manner of ascertaining and paying for the same by the traction company.

The third paragraph of the complaint contains an allegation of the full performance of the contract on the part of the plaintiff, but the fourth paragraph thereof contained a statement that the plaintiff had delivered all the electrical energy that it was required to deliver during the month of August, 1903, "less certain small deficiencies." The fourth paragraph then proceeded to state that the traction company estimated and fixed the amount of such deficiency at the rate provided in the contract and that such adjustment was accepted by the power company. It was held that since it appeared that the deficiencies mentioned in the fourth paragraph of the complaint were of the kind for which the contract permitted deductions to be made, and for which deductions had actually been made, the statement in the fourth paragraph of the complaint that such deficiencies existed did not qualify and render nugatory the allegation in the third paragraph of the complaint that the plaintiff

power company's obligations unless the traction company had fully performed all the obligations which it had assumed. That there being no allegation to that effect in the ninth defense, such defense was demurrable.

In the tenth defense, which was pleaded as a counterclaim, the traction company set forth the contract sued upon and then alleged that at midnight, September 10, 1903, the power company had ceased to deliver any electrical energy whatever to the traction company and had ever since wilfully refused to deliver, and had wrongfully continued to violate all of its obligations under the contract; that the traction company had at all times fully performed the contract on its part; that performance of the contract by the power company would have proved very profitable to the traction company; that by reason of such breach the traction company had suffered damages to the amount of $1,369,444.44, which amount it set up as a counterclaim. It was *held* (PARKER, P. J., dissenting) that a demurrer interposed as to the tenth defense on the ground of insufficiency should be overruled.

The eleventh defense contained in the answer, which was not pleaded as a counterclaim, stated facts which were claimed to excuse the defendants' fault in not paying the amount which the contract required defendant to pay on September 10, 1903, for the electrical energy delivered in August, 1903. It averred that the defendant had always been ready and willing to perform the contract on its part, and that it now offered to proceed with and perform the same; that it had not rescinded the contract, and that it refused so to do. It was held that such defense was not demurrable.

The twelfth defense, as summarized by PARKER, P. J., alleged, among other things, the existence of an unlawful combination between the plaintiff and two other persons. It further alleged that the plaintiff had broken contract "A" at midnight on September 10, 1903, to defendant's great and serious injury. It did not state in such defense what contract "A" was, nor whether the defendant had performed on its part. It was *held* (PARKER, P. J., dissenting) that such defense was not demurrable.

Appeal by the plaintiff from an interlocutory judgment of the Supreme Court in favor of the defendant. *Affirmed in part, reversed in part.*

The plaintiff, the Power Company, brings this action against the defendant, the Traction Company, to recover damages for a breach of contract entered into and bearing date August 1, 1901. The defendant interposed a long answer, consisting of twelve separate defenses. To the 9th, 10th, 11th and 12th of such defenses the plaintiff demurred separately, substantially on the ground that it was insufficient in law upon the face thereof. Upon the trial of such demurrers the defendant attacked the plaintiff's complaint upon the ground that it did not state a cause of action. The trial judge so held, and therefore overruled the demurrers. From the interlocutory judgment entered thereon this appeal is taken.

Before PARKER, P. J., and SMITH, CHASE, CHESTER, and HOUGHTON, JJ.

Henry W. William (*Richard Lockhart Hand,* of counsel), for appellant.

Patrick C. Dugan (*J. S. Landon, E. L. Fursman,* and *Albert Hessberg,* of counsel), for respondent.

Opinion by PARKER, P. J.:

I do not concur with the trial judge in his construction of this complaint. It states that the Power Company and the Traction Company, on or about August 1, 1901, "entered into a contract in writing, bearing date on that day, ready to be produced when and where this court may direct, whereby," etc., and then proceeds to give the substance of the agreement therein, as it understands it; sets forth wherein it claims the Traction Company has broken the same; states the balance due for "energy" delivered thereunder; and seeks to recover such balance and damages suffered on account of such breach. The defendant has annexed to its answer a copy of a contract, which it alleges therein is the same one to which the complaint refers.

Upon the trial it argued that because of the statement in the complaint above quoted, that such contract was ready to be produced when and where the court ordered, the contract so annexed to its answer must be deemed annexed to the complaint, and must be read as a part of the complaint, and that, when so read into the complaint, the facts appearing in such complaint did not warrant a recovery. The trial judge so held. It is not claimed that the complaint on its face, and as it states the contract to be, fails to

But an admission of the truth of the statements contained in a pleading is implied, upon a demurrer, only for the purpose of testing the sufficiency of that pleading. It does not concede their truth for any other purpose. It does not bar the one who demurs from disproving them upon the trial, nor from disputing them when his own pleading is being analyzed to determine its sufficiency. For the purpose of construing the defenses to which the plaintiff has demurred, all the statements of fact in them contained are to be taken as true; but that by no means operates to transfer such statements or facts to the complaint and make them a part thereof. The sufficiency of the complaint should therefore be determined upon the facts which are alleged therein, and those only should be considered.

But assume that every provision contained in the contract was specifically set forth in the complaint, it would still, in my judgment, sufficiently set forth a good cause of action against the defendant. By that contract the Power Company undertakes to furnish to the Traction Company for a period of ten years, a certain specified amount of "electrical energy" for each year, and which yearly amount is specifically distributed among the several months of the year in varying proportions, and for which the Traction Company agrees to pay the sum of $70,000 annually, such payment to be distributed among the several months of the year in certain specified sums, and to be made on or prior to the 10th of each succeeding month. The performance of the contract was to commence on July 1, 1902. It was further provided by the fourth article of the contract that "if, by reason of accident, lack of water, or other matter beyond its control, the Power Company shall at any time be unable to furnish the electrical energy continuously in accordance with the terms of this agreement," the deficiency so arising in the energy furnished for any month should be compensated for by deducting from the amount agreed to be paid for such month a sum equal to $^{3653}/_{10000}$ of a cent per horse power per hour for the amount of such deficiency during the period of its occurrence, and such amount was fixed as liquidated damages for the failure on the plaintiff's part. It was further provided by the sixth article of the contract that the Power Company should also deliver to the Traction Company all the electrical energy, in excess of the amount above required, that

the Power Company could produce at its water power plant, provided that the Traction Company should not be obliged to receive in any one day "excess energy" amounting to more than 500 horse power. Provision was also made for the amounts and times and manner of ascertaining and paying for the same by the Traction Company.

With the contract so annexed, the contention is as follows: In order to recover against the Traction Company for a breach of this contract, the plaintiff must show, and hence must aver in the complaint, a full performance on its part. The third paragraph contains an allegation to that effect, but the fourth paragraph contains a statement that it delivered all the energy that it was required to deliver during the month of August, 1903, "less certain small deficiencies." By the fourth article of the contract deficiencies to a certain extent, viz., such as occurred through matter beyond the control of the Power Company, were permitted, and provision was made for a money compensation for the same. And if it appeared in the complaint that such deficiencies occurring in August were of the kind so permitted, then their existence would not necessarily modify the averment in the third paragraph, and be a concession that full performance had not been made. In that event both averments might be consistent. And so in the original complaint, it being left to appear that such a money compensation might be made for all deficiencies, a concession of nonperformance could not be claimed from the averments in its fourth paragraph. But, now that the full terms of such fourth article are found in the complaint, a clear admission appears in its fourth paragraph that default was made in furnishing the requisite

the $4,670.84, which the contract required the Traction Company to pay for said month of August; and that the balance only, viz., $4,460.58, is the amount for which such company made default on September 10th, and for which this action seeks to recover.

It is apparent, therefore, that the "certain deficiencies," conceded to exist in that paragraph, were of the kind referred to in the fourth article of the contract. They were of the kind for which compensation could be made by the method and at the rate fixed in the contract. The complaint shows that such compensation at such rate was actually made and adjusted by the parties hereto, and the claim for the balance due to plaintiff is made up on such adjustment. Clearly such an averment is entirely consistent with the allegation of full performance contained in the third paragraph of the complaint. That general allegation is not in the least contradicted or qualified by the allegations of paragraph 4, even though it is not specifically stated therein that such deficiencies were of the kind referred to in the contract.

The further claim, that no averment of the delivery of all the "surplus energy" referred to in the sixth article of the contract is contained in such complaint, is not correct. It is fully covered by the allegations contained in the third paragraph, above referred to.

I conclude that the criticism of the complaint is not sustained, and that it becomes necessary to examine the demurrers to the several defenses, each on its own merits.

As to the ninth defense, it sets forth the contract between the parties, and claims that by its terms the Traction Company had been entitled, ever since July 1, 1902, to have delivered to it by the plaintiff, in addition to the electrical energy provided for in article 1 of such contract, all that the plaintiff's water power plant therein referred to was capable of producing. It then proceeds to aver that during the month of August, 1903, it produced a large amount of such excess energy, which, in disregard of its obligation, it sold and delivered to other parties, and failed and refused to deliver it to the Traction Company. That by reason of such refusal to deliver such additional electric energy during August, 1903, the Traction Company suffered damages to the amount of $1,073.20, and it asks to recover such damages as a counterclaim in this action. These are all of the material allegations contained in such defense.

It appears in the sixteenth article of the contract that the "agreement is an entire contract, each stipulation thereto being a part of the consideration for every other." It further appears in such contract that payment for such excess of electrical energy was to be made at the end of each year, and that the Traction Company shall notify the Power Company by mail each day of any "excess of energy used." This contract being entire, and each stipulation being dependent upon every other, evidently the Traction Company could not recover against the Power Company for a breach of any of its obligations, unless it had fully performed all the obligations which it had assumed on its part. There being no allegation to that effect in this ninth defense, no right to recover damages against the plaintiff for a breach of the contract is stated therein. Moreover, this defense is pleaded solely as a counterclaim, and for the same reasons as hereinafter stated with reference to the tenth defense, as well as for the above reason, the demurrer thereto was well taken.

The tenth defense is also pleaded entirely as a counterclaim. It sets forth the contract, and then charges that at midnight on September 10, 1903, the Power Company had ceased to deliver any "electrical energy" whatever to the Traction Company, and had ever since willfully refused to deliver any, and wrongfully continued to violate all the obligations of the contract on its part. It then avers that the Traction Company has at all times fully performed the contract on its part. It then avers that performance of the contract by the Power Company would have proved very profitable to the defendant; because the price for "electrical energy" which it was to pay under the contract was much less than it could otherwise procure it, and that, therefore, by reason of such breach, it had suffered damages to the amount of $1,369,-444.44, and it asks to recover that amount as a counterclaim against the plaintiff.

The plaintiff claims that in an action brought by it to recover damages against defendant for a breach of the contract on its part the facts above pleaded cannot be used to sustain a counterclaim in defendant's favor. The demand which such facts would create in favor of defendant "would not tend in some way to diminish or defeat the plaintiff's recovery." Code Civ. Proc., § 501. Evidently, if the facts therein stated are true, and the plaintiff has

failed to perform the contract as therein alleged, it cannot maintain this action; and so the very facts which are relied upon and are necessary to create this counterclaim operate as a full and complete defense to the plaintiff's claim in this action, and show that it never existed. So that, if the plaintiff's claim can be established, the counterclaim must fail; and, if the counterclaim is proven, the plaintiff's claim cannot exist. Such conflicting claims cannot coexist, and hence the one does not tend to diminish or defeat the other. *Bellinger v. Craigue,* 31 Barb. 534; *City of Schenectady v. Furman,* 61 Hun, 171, 15 N. Y. Supp. 724; *Prouty v. Eaton,* 41 Barb. 409; *Walker v. Am. Cent. Ins. Co.,* 143 N. Y. 167, 38 N. E. 106. See, also, *Reilly v. Lee,* 85 Hun, 315, 32 N. Y. Supp. 976, affirmed 155 N. Y. 691, 50 N. E. 1121.

For this reason the counterclaim stated in the tenth defense is not well pleaded, and the demurrer should be sustained.

As to the eleventh defense, it is not pleaded as a counterclaim. It states facts claiming to excuse the defendant's default in not paying the amount required by the contract to be paid by the defendant by September 10, 1903, for the "energy" delivered in August previous; avers that it has always been ready and willing to perform the contract on its part, and now offers to proceed with and perform the same. It also states that it has not rescinded the contract, and refuses so to do.

I am of the opinion that the facts therein stated tend to establish an equitable defense against the plaintiff's claim that the defendant had rescinded and abandoned the contract in its entirety; and that, if established, would warrant equitable relief, at least against the claim for the prospective profits demanded in the complaint. I think a defense to that extent is set out, and hence the demurrer thereto was correctly overruled.

The twelfth defense, although it charges an unlawful combination between the plaintiff and two others, seems to contain no facts which even tend towards a defense to the plaintiff's demand in this action, or towards a counterclaim thereto, other than the fact that the plaintiff had broken contract "A," so called, at midnight on September 10th, to defendant's great and serious injury. It does not tell in this twelfth defense what contract "A" was, nor whether the defendant had performed on its part. I cannot discover that it sets forth any defense, nor any facts constituting a

[illegible] in the [illegible] defense. [illegible]

My [illegible] the demurrer to the seventh defe[illegible] the [illegible] party [illegible] that the dem[illegible] the sixth, tenth and twelfth defenses should have [illegible].

My brethren however, while they concur in my conclu[illegible] and in my reasoning [illegible] the sixth and seventh [illegible] set up in the answer, do not agree with me concerni[illegible] tenth and twelfth paragraphs therein mentioned. As to such [illegible] and defense they are of the opinion that the demurr[illegible] should be overruled, and the judgment of this court is [illegible] accordingly.

Interlocutory judgment reversed and demurrer sustained as to the [illegible] defense and overruled as to the tenth, seventh and twelfth defenses [illegible] answer, with leave to the plaintiff to reply to such counterclaims the de[illegible] to which has been here overruled, and with leave to the defendant to [illegible] the sixth paragraph of its answer as it may be advised. No costs to [illegible] party. All concur except FRANKLIN, P. J., who votes to sustain the pl[illegible] demurrer as to the tenth, seventh and twelfth defenses; and CAMPB[illegible] HOUGHTON, JJ., who vote to overrule the demurrer as to all the d[illegible] demurred to.

CLEARY v. ST. LOUIS TRANSIT CO.

Missouri, St. Louis Court of Appeals — Nov. 29, 1904.

108 Mo. App. 433, 83 S. W. 1029.

1. INJURY TO HORSE BY CONTACT WITH TROLLEY WIRE IN STREET — PRESUMPTION OF NEGLIGENCE. — In an action against a street ra[illegible] pany for injuries to a horse resulting from contact with a [illegible] in the street, it was held that a *prima facie* case was perfect[illegible] ing that one of defendants' wires, charged with electrical [illegible] cient to destroy life, was down upon a public highway.

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1. Injuries by Electricity.
2. Contact with Live Wires in Streets.
3. Degree of Care by Street Railway Company W[illegible] Is Broken and Fallen in Street.

1. Injuries by Electricity. — Injury by falling tro[illegible] *St. Ry. Co. v. Karturright* (Tenn.), 8 Am. Electl. Cas[illegible] 763, 75 S. W. 719; *Hollis v. Brooklyn Heights R. R. Co.*, [illegible] 821, 113 N. Y. Supp. 4; death caused by defective insula[illegible]

counterclaim; certainly no more than were contained in the ninth and tenth defenses, which we have seen above are both demurrable.

My conclusion is that the demurrer to the eleventh defense set up in this answer was properly overruled, and that the demurrers to the ninth, tenth, and twelfth defenses should have been sustained.

My Brethern, however, while they concur in my conclusions and in my reasoning concerning the ninth and eleventh paragraphs set up in the answer, do not agree with me concerning the tenth and twelfth paragraphs therein contained. As to such counterclaim and defense they are of the opinion that the demurrer to each should be overruled, and the judgment of this court is rendered accordingly.

Interlocutory judgment reversed and demurrer sustained as to the ninth defense, and overruled as to the tenth, eleventh, and twelfth defenses in the answer, with leave to the plaintiff to reply to such counterclaims the demurrer to which has been here overruled, and with leave to the defendant to amend the ninth paragraph of his answer as he may be advised. No costs to either party. All concur, except PARKER, P. J., who votes to sustain the plaintiff's demurrer as to the ninth, tenth, and twelfth defenses; and CHESTER and HOUGHTON, JJ., who vote to overrule the demurrer as to all the defenses demurred to.

CLEARY v. ST. LOUIS TRANSIT CO.

Missouri, St. Louis Court of Appeals — Nov. 29, 1904.

2. SAME — EFFECT OF GENERAL STRIKE UPON STREET RAILWAY'S LIABILITY FOR NEGLIGENCE. — The prevalence of a general strike, and the lawlessness attending such a situation does not relieve a street railway company from liability for negligence in permitting a dangerous wire to be in the street.

Appeal by defendant from a judgment for plaintiff. *Affirmed.*

Boyle, Priest & Lehman, for appellant.

J. F. & R. H. Merryman, for respondent.

Opinion by REYBURN, J.:

This action originated before a justice in whose court judgment was recovered against appellant and its codefendant, the city of St.

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v. *Shreveport Belt Ry. Co.*, 2 St. Ry. Rep. 362, 112 La. 363, 36 So. 414; bicyclist injured by electric shock received by contact with stay wire from trolley pole, see *Walters v. Syracuse Rapid Transit Co.*, 2 St. Ry. Rep. 758, 178 N. E. 50, 70 N. E. 98; see note on live electric wire in street, 2 St. Ry. Rep. 758; on injuries caused by electricity, 1 St. Ry. Rep. 332, 639, 642.

As to injuries to pedestrian from contact with rail charged with electricity, see *Anderson v. Seattle, Tacoma, Inter Urban Ry. Co.*, *post*, 3 St. Ry. Rep. 894, 36 Wash. 387, 78 Pac. 1013. As to injuries to servant while painting iron poles, due to defective appliances, see *Smith v. Twin City Rapid Transit Co.*, *post*, 5 St. Ry. Rep. 527, 112 N. W. 1001. As to injuries to telegraph lineman from contact with feed wire, see *Postal Telegraph Cable Co. v. Likes*, *post*, 225 Ill. 249, 80 N. E. 136. As to injuries to workman from discharge of electricity from feed wire, see *Carey v. Manhattan Ry. Co.*, 5 St. Ry. Rep. 760, 50 N. Y. Misc. 335. As to injuries by contact with wire hanging in street charged with electricity from an electric guy wire from an overhead trolley system, see *Miller v. Kenosha Elect. Ry. Co.*, 135 Wis. 68, 115 N. W. 355.

2. **Contact with Live Wires in Streets.** — The rule is, as established by the weight of authority, that the falling into the street of a wire so heavily charged with electricity as to be a source of danger, is of itself presumptive proof of negligence of the company in maintaining the wire; unless such proof is rebutted a person injured thereby will be entitled to recover damages. *Chattanooga Elec. Co. v. Mingle*, 7 Am. Electl. Cas. 594, 103 Tenn. 667, 56 S. W. 23. See also *O'Flaherty v. Nassau Elec. Ry. Co.*, 7 Am. Electl. Cas. 535, 35 App. Div. 74, 54 N. Y. Supp. 96; *Newark Electl. L. & P. Co. v. Ruddy*, 7 Am. Electl. Cas. 524, 62 N. J. L. 505, 41 Atl. 712; *Gannon v. Laclede Gas Light Co.*, 7 Am. Electl. Cas. 508, 145 Mo. 502, 46 N. W. 968, 47 N. W. 907 (holding that where a fireman in the discharge of his duty stepped on a fallen electric wire of the defendant, which had broken and was lying upon the public highway, and was thereby killed, a *prima facie* case of negligence on the part of the defendant was made out, and the burden rested upon the defendant to show want of notice or other valid excuse); *Snyder v. Wheeling Elec. Co.*, 7 Am. Electl. Cas. 473, 43 W. Va. 661, 28 S. E. 733 (holding that

Louis, but on appeal and trial anew in the Circuit Court a verdict was returned by the jury against appellant, the city being discharged by nonsuit. The basis of plaintiff's cause of action was alleged in his complaint to be that on or about the 18th day of May, 1900, defendant negligently allowed its trolley wire, charged with electricity, to hang down so that it came into contact with plaintiff's horse on an open public street of the city of St. Louis, killing the animal. The facts developed at the trial were that about 8 o'clock in the morning of the 18th of May, 1900, the plaintiff drove into Eighth street from Cass avenue, turning southward on the defendant's track, when he heard some one exclaim, "Wire down!" and he pulled to the right-hand side of the street,

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the doctrine of *res ipsa loquitur* is applicable where a wire, charged with a deadly current of electricity, falls from its proper place of elevation to the street, and there kills a man lawfully passing along and coming in contact with it); *Jones v. Union Ry. Co.*, 7 Am. Electl. Cas. 447, 18 App. Div. 267, 46 N. Y. Supp. 321; *Devlin v. Beacon Light Co.*, 7 Am. Electl. Cas 563, 192 Pa. St. 188, 43 Atl. 1062 (holding that an electric light company which in making alterations in its line allows an arc wire to lie upon the pavement in a much traveled part of a city without guard or warning to passersby, is *prima facie* negligent); *Western Union Tel. Co. v. State*, 6 Am. Electl. Cas. 210, 82 Md. 293, 33 Atl. 763; *Larson v. Central Ry. Co.*, 56 Ill. App. 263; *Clark v. Nassau Elec. Ry. Co.*, 6 Am. Electl. Cas. 234, 9 App. Div. 51, 41 N. Y. Supp. 78 (holding that where a horse stepped on the rail of an electric street railway and immediately fell to the ground in a dying condition, and the driver, touching the hames, received a severe shock, it is *prima facie* proof of defective insulation, and so of negligence on the part of the railway company); *Suburban Elec. Co. v. Nugent*, 6 Am. Electl. Cas. 238, 58 N. J. L. 658, 34 Atl. 1069 (in which case the dead body of a policeman was found at

where he was compelled to pass a small wagon, and after going on further, he perceived a large wagon or dray drawing near. He was on the right-hand side of the street, and was watching the vehicle to see if it was going to pull out of the way, and when he saw that it was not going to move he was forced to pull to the left to avoid being struck by it, and, just as he did, the wire struck his horse, causing the damages. That the wire was of the thickness of a lead pencil, dirty and dark, and he did not perceive it until he was upon it; and, looking ahead, he had not seen the wire, although it was a light day. As stated by appellant, the occurrence was pending the existence of the general street car strike affecting defendant's whole system, which was then in great state of disorder, trolley wires being down all over the city by reason

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upon a public street, was the simple fact that it was found so broken and suspended, and that the injury by shock ensued. It was held that such evidence was sufficient to establish a *prima facie* case, and that it imposed upon the defendant the burden of making it appear that the unsafe and insecure condition of the wire was not due to any negligence upon its part. The doctrine of *res ipsa loquitur* applied and the plaintiff was relieved from the burden of proving the non-existence of an adequate explanation or excuse.

3. Degree of Care by Street Railway Company Where Trolley Wire Is Broken and Fallen in Street. — In the reported case it is held that an electric railway is required to use the highest degree of care to protect persons using the streets. See also *Woods v. Wilmington City Ry. Co.*, *post*, 5 Pen. (Del.) 369, 64 Atl. 246; *Garretson v. Tacoma Ry. & Power Co.*, 50 Wash. 24, 96 Pac. 512.

In the case of *Neal v. Wilmington & N. C. Elec. Ry. Co.* (Del.), 3 Penn. 467, 53 Atl. 338, it appeared that a guy wire supporting an electric trolley line had fallen and became charged with electricity. The plaintiff's intestate, while walking along the highway, came in contact with such wire, and was killed. The defendant company had notice of the broken wire and permitted it to remain in the condition it was in at the time of the accident for several hours. It was held that the defendant was bound under such circumstances, to exercise such care to prevent injury as a reasonably prudent man would exercise under such circumstances, considering the dangerous character of the wire, the existing conditions and the surrounding circumstances; that a traveler on a highway is entitled to assume that it is reasonably safe, and, while required to use reasonable care and caution to avoid danger, is not required to search for obstructions and dangers therein; that where the proximate cause of the death of the plaintiff's intestate was the defendant's negligence in permitting a guy wire to fall in a street and become charged with electricity, it was immaterial that the negligence of some third person may have contributed to the accident.

As to care required of electric companies, see generally note to *Guest v. Edison Illuminating Co.*, *post*.

of such strike, and at this particular point the defendant had been unable to operate its cars for several weeks. That conflict in the testimony was confined to the length of time this wire had been down. One witness deposed the wire had been down a couple of days, and that he had given notice twice by telephone to the Cass avenue stable of defendant; other witnesses said it had been down only since morning.

The court below properly refused the usual imperative instruction at close of the testimony tendered on plaintiff's behalf, as a *prima facie* case was perfected by showing that one of defendant's wires, charged with the electrical current sufficient to destroy life, was down upon a public thoroughfare and highway of the city of St. Louis, and the burden was then shifted to the defendant to establish that its wire was down by no fault of its own. *Gannon v. Gaslight Co.,* 7 Am. Electl. Cas. 509, 145 Mo. 502, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505. The prevalence of the general strike, suspending operation of its cars, and the lawlessness attending such situations, so far from excusing or justifying the perilous condition of the wire, rather aggravated it, and lent force to the charge of negligence in permitting the electric power to be conducted through the wire at a period when, from the suspension of the system, and the continued cessation of its cars, such motive power had not been for a long period, and was not then, required to propel them. The case above invoked in support of the principle announced, as counsel for appellant justly says, has been the subject of comment and criticism in succeeding utterances of the same tribunal, but its controlling force has not been impaired nor qualified by any subsequent decision, or otherwise than in the dissenting opinions accompanying, upon the proposition here presented, and it remains decisive of such proposition at the present time. Nor can we accede to the contention that plaintiff's testimony exhibited such want of care on his part as to bar any recovery. Whether, under the emergency confronting him, plaintiff exercised ordinary care in view of the conditions attending his situation, was a question properly referred to the jury. The charge to the jury was made up of an elaborate series of instructions embracing all six asked by defendant, and no infirmity has been revealed in them justifying reversal.

Judgment affirmed. All concur.

METROPOLITAN STREET RAILWAY CO. v. GILBERT.

Kansas Supreme Court — Dec. 1, 1904.

3 St. Ry. Rep. 254, 78 Pac. 807.

ELECTRICITY AS MOTIVE POWER — DEGREE OF CARE. — A street railway that employs electricity as a motive power is required to exercise the highest degree of care to protect persons using the streets from the danger of being injured by the electric current, and is liable for any damages occasioned by its failure to do so.

(Syllabus by the Court.)

Error brought by defendant from judgment for plaintiff. *Affirmed.*

Miller, Buchan & Miller, for plaintiff in error.

L. W. Keplinger, C. W. Trickett, M. J. Reitz, F. D. Hutchings, and *J. W. Dana,* for defendants in error.

Opinion by MASON, J.:

Edward Gilbert recovered a judgment against the Metropolitan Street Railway Company on account of injuries received by him through coming in contact with the end of a broken telegraph or telephone wire which had fallen to the ground upon a public street and had become charged with electricity by contact with the wire of the railway company. The company brings this proceedings to reverse the judgment. Only one question is presented — whether it was error for the trial court to charge the jury that the defendant was bound to use the highest degree of care to avoid injuries to persons using the streets, and to discover and remedy the dangerous condition arising from the falling of the foreign wire across its own. Plaintiff in error contends that it should have been held to the exercise of only ordinary diligence.

Although it is everywhere recognized that it is the duty of users of electricity to employ a high degree of diligence to prevent its causing injury to others, in many cases this principle is treated merely as an application of the general rule, and is expressed by the formula that ordinary care is required, proportioned to the danger to be guarded against. But the peculiar conditions involved in cases of injury by electricity have given rise to a special doctrine, somewhat analogous to that requiring operators of railways to use all possible skill and care for the protection of pas-

sengers. *Topeka City Ry. Co. v. Higgs,* 38 Kan. 375, 16 Pac. 667, 5 Am. St. Rep. 754. In Thompson on Law of Electricity, it is said (§ 65):

"It may be doubted whether persons or corporations employing for their own private advantage so dangerous an agency as electricity ought not to be regarded as *quasi*-insurers, as toward third persons, against any injurious consequences which may flow from it. It may be doubted whether one who collects, or rather creates, so dangerous an agency on his own land, ought not to be held to the obligation of restraining it — that is, of insulating it — at his own peril."

The reasoning thus suggested was employed in an English case (*National Telephone Co. v. Baker,* L. R. 1893, 2 Ch. Div. 186, 201) in support of a ruling that an electric railway company might be liable for damage caused by an electric current which it had created, irrespective of any question of negligence. No court in this country seems to have gone so far as this, but the requirement of the use of extraordinary care has been generally approved when it has been the subject of discussion. In Croswell on the Law Relating to Electricity the rule derived from the American cases is thus state (§ 234):

"If but little danger is incurred — as, for instance, when the wires carry only a harmless electric current; such, for instance, as the telegraph or telephone current — only ordinary care may be required; while if the wires carry a strong and dangerous current of electricity, so that negligence will be likely to result in serious accidents, and perhaps death, or if a harmless wire is in dangerous proximity to a high-tension wire, a very high degree of care, indeed — the highest that human prudence is equal to — is necessary. This is particularly true of electric light and electric railway wires, which carry a high-tension current often of great danger."

All the reasons that support the rigid enforcement of this rigid rule against the carrier of passengers by steam apply with double force to those who are allowed to place above the streets of a city wires charged with a deadly current of electricity, or liable to become so charged. The requirement does not carry with it too heavy a burden. Human skill can easily place wires and poles so that they will not break and fall, unless subjected to some strain that could not be anticipated; and it can as readily prevent the possibility, under ordinary circumstances, of the contact of wires that should not be allowed to touch one another. *Haynes v. Raleigh Gas Co.,* 5 Am. Electl. Cas. 264, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep, 786. "Public policy, from sheer necessity, must require of a person or corporation using the current of electricity in high tension along highways a very high, if not the highest degree of care." *Snyder v. Wheeling Electrical Co.,* 7 Am. Electl. Cas. 473, 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922. "Very great care might be sufficient as to the wires at points remote from public passways, buildings, or places where persons need not go for work or business; but the rule should be different as to points where people have the right to go for work, business, or pleasure. At the latter points or places the insulation or protection should be made perfect, and the utmost care used, to keep it so." *McLaughlin v. Louisville Electric Light Co.,* 6 Am. Electl. Cas. 255, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812. "The business of supplying electricity to the residents of a city is so fraught with peril to the public that the highest degree of care which skill and foresight can attain, consistent with the practical conduct of the business under the known methods and present state of its particular art, is demanded." *Denver Electric Co. v. Lawrence,* 8 Am. Electl Cas. 617, 31 Colo. 301 (4th par., syllabus), 73 Pac. 39. "Wires charged with an electric current may be harmless, or they may be in the highest degree dangerous. The difference in this respect is not apparent to ordinary observation, and the public, therefore, while presumed to know that danger may be present, are not bound to know its degree in any particular case. The company, however, which uses such a dangerous agent, is bound not only to know the extent of the danger, but to use the very highest degree of care practicable to avoid injury to every one who may

be lawfully in proximity to its wires, and liable to come, accidently or otherwise, in contact with them." *Fitzgerald v. Edison Electric Illuminating Co.,* 8 Am. Electl. Cas. 584, 200 Pa. St. 540, 50 Atl. 161, 86 Am. St. Rep. 732. "Electric companies, of course, are not bound to have perfect apparatus or perfect construction, but they are required to exercise a degree of care and prudence in the construction and maintenance of their wires commensurate with the danger; and where their wires are designed to carry a strong and powerful current of electricity, so that persons coming in contact with them are certain to be seriously injured, if not killed, the law imposes upon the company the duty of exercising the utmost care and prudence to prevent such injury." *Perham v. Portland General Electric Co.* (Oreg.), 7 Am. Electl. Cas. 487, 53 Pac. 14, 40 L. R. A. 799, 72 Am. St. Rep. 730. See, also, *Thomas v. Wheeling Electrical Co.* (W. Va.), 8 Am. Electl. Cas. 528, 46 S. E. 217; *Daltry v. Media Electric L., H. & P. Co.* (Pa.), 9 Am. Electl. Cas. —, 57 Atl. 833; *Geismann v. Missouri Edison Electric Co.* (Mo. Sup.), 8 Am. Electl. Cas. 509, 73 S. W. 654; *Harter v. Colfax Electric Light & Power Co.* (Iowa), 9 Am. Electl. Cas. —, 100 N. W. 508; 18 Cent. Dig. column 603; 10 Am. & Eng. Enc. of Law (2d ed.), 887. In the cases in which it is stated or assumed that a liability for damages occasioned by electricity arises only from the failure to exercise ordinary care, no consideration appears to have been given to the distinction noted, based upon its peculiar nature. The distinction is equally well grounded in reason and authority. The course of

turn out an incandescent light, *held*, that the evidence warranted a finding by the jury that the wire for incandescent lighting and the wire for arc lighting had been placed so close to one another as to be dangerous.

2. CONTRIBUTORY NEGLIGENCE. — The fact that the intestate, before attempting to turn out the lights, had previously seen another attempt to do so, and had seen him draw his hand back because of the shock received, did not establish that the intestate was guilty of contributory negligence as matter of law.

Appeal by defendant from a judgment of the Supreme Court in favor of the plaintiff. *Affirmed.*

L. Sidney Carrère, for the appellant.

Thomas Watts, for the respondent.

Opinion by WILLARD BARTLETT, J.:

The defendant corporation maintains an electric lighting plant in the city of Middletown, furnishing lights under the incandescent system and the arc system. For the maintenance of incandescent lights the necessary voltage is only 110, while the arc wire carries 2,300 volts. The plaintiff's intestate was killed by a shock of electricity received while he was endeavoring to put out some of the incandescent lights upon a chandelier in front of the bar in a cafe upon West Main street in the city of Middletown on the evening of January 22, 1902. There was evidence tending to show that the electric current which caused his death proceeded from one of the defendant's arc wires which had come in contact with the wire intended for incandescent lighting only. There was also proof in the case warranting a finding by the jury that such contact was due to improper construction shortly before the accident, that is to say, the testimony indicated that the wire for incandescent lighting and the wire for arc lighting had been placed so close to one another as to be dangerous in the first instance, or as to be likely to become dangerous under weather conditions reasonably to be expected.

It is earnestly insisted that the deceased, who was himself an electrician, was shown to have been guilty of contributory negligence; but I think that this question also was properly left to the jury. It is true that he had seen the proprietor of the cafe attempt to turn out the lights on the chandelier, and had seen him draw back on account of the shock received. On the other hand,

it is to be observed that the deceased must have noticed that this shock had not produced any serious effects; and it cannot be held as a matter of law that he was at fault for supposing that he could turn out the lights himself without risk of fatal injury.

On the question of contributory negligence, council for the defendant asked the learned trial judge to charge that if the deceased's negligence or want of ordinary care contributed in the slightest degree to the accident, the plaintiff could not recover. The record shows the following response to this request:

"The Court: If it *contributed* to any extent. It must have been a neglect of ordinary prudence, ordinary caution. (To the jury): You have no right to inquire how largely that negligence, if it existed, contributed; if it contributed at all, then it would defeat the action. But the negligence itself must have been of the character that I have already described, a neglect of ordinary caution. If there was any negligence on his part, such as has been urged upon you, that would defeat the action. It is for you to say whether his conduct was negligent or not. Mr. Carrère: Under all the circumstances? The Court: Yes."

It is conceded in the brief for the appellant that the foregoing language of the court cured any error there might have been in the principal charge upon the subject of contributory negligence, if it were not for the emphasis laid on the word "contributed." I am unable to perceive how such emphasis could have injured the defendant, inasmuch as it is certainly true that any negligence on the part of the deceased was wholly immaterial, unless it tended to bring about the injury which gave rise to the action.

The verdict was $2,000. It is contended that this amount is excessive, because, under the circumstances, nominal damages only should have been awarded, and because the court erred in instructing the jury as to the measure of damages. The deceased was the son of the plaintiff, and at the time of his death was twenty-one years of age and was earning ten dollars a week. He lived with his father, who was a merchant in Middletown, sixty-five years of age at the time of the accident. The son was a young man of good habits, sober and industrious. He was unmarried, and the amount of the recovery in this action would go wholly to the father as the sole next of kin. In view of these facts, counsel for the defendant asked the court to charge that the plaintiff had failed to show any pecuniary damage, and therefore, could not recover anything but nominal damages. This request was refused, and an exception was duly taken. The case of *Ihl v. Forty-second*

Street, etc., R. R. Co., 47 N. Y. 317, 321, is authority for the proposition that it is error to direct a jury to find only nominal damages in an action for wrongfully causing the death of a child of tender years. I cannot see why such a direction would not be equally objectionable where the victim of the defendant's negligence is an adult.

In reference to the amount recoverable, if there was to be any recovery at all, the learned trial judge told the jury that the statute allowed only fair compensation for the pecuniary loss suffered, meaning thereby the loss of money or money's worth, and he continued as follows:

"Although the action is maintained by the plaintiff as administrator, he maintains it for his own benefit and his own benefit entirely. It is just a question of how much in all human probability the plaintiff would in the course of his life have received in the way of pecuniary benefit from his son if he had lived. Nobody can lift the curtain of the future and see what is behind it. Nobody knows whether this young man would have lived another year. If he had lived, you would have to consider whether he would have married and had a family of his own; whether his duties and obligations in that direction would have been likely to consume any means that he might have acquired. You have got to consider that his father was in comfortable circumstances. The father's need to call upon his son at all should be considered, in view of the fact that he is himself a man of considerable means. The young man's health might have failed, if he had lived, and the father himself might not have lived to a time when he would require any aid from his son. You can see that there are a thousand peradventures about it. You must consult your experience in human life. How is it generally between a father and a son? Here was a son twenty-one years old; the father is advanced in years. How much money, or money's worth, do you think, on your oaths, this plaintiff, this father, would have received from his son if he had lived? That is the measure of all the recovery that you are entitled to give the plaintiff. You must discard all sympathy. If you do not, you will do injustice. You must confine yourselves absolutely to what, in your conservative judgment, it can fairly be said that this plaintiff would, in all human probability, have received in the way of money, or money's worth, from his son if he had lived."

At this point counsel for the defendant excepted to the whole charge on the question of damages, on the ground that it was permitting the jury to speculate and to conjecture, when there was no evidence upon which they could base any damages in the case, whereupon the following colloquy took place, as set out in the record:

"The Court: By reason of the fact that nothing can be known about the future, call it whatever name you like, it *is speculation. It* is speculation,

no more and no less, in all these cases. The courts may say what they please about there being no right to speculate. It is one of the cases in which they have to speculate or find a verdict for the defendant. The future is altogether unknown. Mr. Carrère: On that ground I ask you to direct a verdict for the defendant. The Court: No; (to the jury) it is like all these cases, gentlemen; it is a matter for the exercise of your sound discretion as to what will be a fair compensation to the plaintiff for any pecuniary loss he has sustained by reason of his son's death."

Considering together all that the court said on the subject of damages, it does not seem to me that any error was committed or that the jury could have been mislead. As was said by Finch, J., in *Houghkirk v. President, etc., D. & H. C. Co.*, 92 N. Y. 219, 225, the damages to the next of kin by reason of the loss of a human life are necessarily indefinite, prospective and contingent. "They cannot be proved with even an approach to accuracy, and yet they are to be estimated and awarded, for the statute has so commanded. But even in such case there is, and there must be, some basis in the proof for the estimate, and that was given here and always has been given. Human lives are not all of the same value to the survivors. The age and sex, the general health and intelligence of the person killed, the situation and condition of the survivors and their relation to the deceased; these elements furnish some basis for judgment. That it is slender and inadequate is true; * * * but it is all that is possible, and while that should be given, * * * more cannot be required."

The case of *Birkett v. Kinderbocker Ice Co.*, 110 N. Y. 504, is an additional decision to the effect that the authorities in this State would not justify a ruling that nominal damages only could be recovered in this class of cases; and as to the instruction that the assessment of damages in cases of this character must always be to some extent speculative, reference may be made to *Etherington v. Prospect Park & Coney Island R. R. Co.*, 88 N. Y. 641, where a charge was sustained in which the jury were instructed that there was no way to ascertain mathematically what the damage would be, and that it necessarily must be to a great extent speculative. "The proof may be unsatisfactory," says EARL, J., in *Lockwood v. N. Y., L. E. & W. R. R. Co.*, 98 N. Y. 523, 527, "and the damages may be quite uncertain and contingent, yet the jurors in each case must take the elements thus furnished and make the best estimate of damages they can.

In addition to the general rule laid down in the authorities which have been cited, we may find a precedent closely resembling the case at bar in *Bierbauer v. N. Y. C. & H. R. R. R. Co.*, 15 Hun, 559, in which the General Term of the third department refused to interfere with a verdict of $5,000, where the deceased was about twenty-one years old, and his father, about sixty-five years of age, was his next of kin, and alone entitled to compensation under the statute. It is true that Mr. Justice BOCKES, who wrote the opinion, was in favor of a reduction of the verdict, but he was overruled in this respect by his associates.

I advise an affirmance of the judgment and order under review.

Judgment and order unanimously affirmed, with costs.

CITY OF HENDERSON v. YOUNG.

Kentucky Court of Appeals — Dec. 7, 1904.

26 Ky. Law Rep. 1152, 83 S. W. 583.

POWERS OF CITY TO MANAGE AND OPERATE ELECTRIC PLANT. — In the management and operation of its electric plant a city is not exercising its governmental or legislative powers, but its business powers, and may conduct it in the manner which promises the greatest benefit to the city

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Power of Municipality to Erect and Maintain an Electric Light Plant. — An expense incurred by a municipality in building and operating its plant to furnish lights is a necessary expense, and is not such a debt as must be submitted to a popular vote before it can be incurred under section 7 of article 7 of the Constitution of North Carolina. The power to light the streets and public buildings and places of a city is implied, because the use of such power is necessary to fully protect the lives and comfort and property of its inhabitants. Possessing the authority to do the lighting, the power carries with it incidentally the further power to provide the necessary plant to generate and supply the electricity required. *Fawcett v. Town of Mt. Airy*, 8 Am. Electl. Cas. 341, 45 S. E. 1029, and note thereunder. See also the following cases and notes thereunder: *Linn et al. v. Chambersburg*, 4 Am. Electl. Cas. 647; *Citizens' Gaslight Co. v. Town of Wakefield*, 5 Am. Electl. Cas. 631; *Jacksonville Electric Light Co. v. City of Jacksonville*, 6 Am. Electl. Cas. 668.

Other cases in this volume relating to the power of municipalities to maintain electric light plant. *McIlhinny v. Village of Trenton, post* (no right to erect plant in center of street); *Baker v. City of Cartersville, post* (issuance of bonds); *Norwich Gas & Electric Co. v. City of Norwich, post* (compelling city to purchase private plant pursuant to statute); *Todd v. City of Crete, post; Overall v. City of Madisonville, post* (police power); *Lighthipe v. City of Orange, post.*

and its inhabitants in the judgment of the city council; and it is not within the province of the court to interfere with the reasonable discretion of the council in such matters.

Appeal by defendant from a judgment for plaintiff. *Reversed.*

John Francis Lockett, for appellant.

Clay & Clay, for appellee.

Opinion by BURNAM, C. J.:

This action was instituted by the appellee, S. A. Young, a resident and taxpayer of the city of Henderson, to enjoin the city authorities from furnishing to property outside of the city limits an electric light current from the electric light plant belonging to the city, upon the grounds that by the express terms of subsection 5 of section 3290 of the Kentucky Statutes of 1903, which is a section of the charter of cities of the third class, to which Henderson belongs, it was only authorized to provide the city and the inhabitants thereof with water, light, power, heat, telephone service, etc., and by necessary implication it was prohibited from extending such service beyond the city limits. The city, for answer, says, in substance: "That the electric light plant belonging to the city is equipped with machinery which is capable, with the same number of employee now found necessary to conduct it, to furnish, with a small additional expense for fuel, light to a very much larger number of customers than it now has, or is likely to have for some years to come; and that the only way in which it can pay for the construction of the plant and meet its operating expenses is to enlarge the number of its probable customers; that in the instance complained of it has the personal guaranty of solvent parties, living just outside of the city limits, to pay such a sum for three years as will reimburse it for all the expense to which the city would be subjected in making the proposed extension, and to take and pay for the electric current to be furnished by the city at ten per cent in excess of the price charged to residents of the city. It is further alleged that the city will be in no wise embarrassed in its duty to furnish light to the city by the proposed contract with parties living outside of the city, but that such contract would be for the mutual benefit of both parties." A general demurrer was sustained to the answer, and

the city perpetually enjoined from extending its electric current outside the city limits, and the city has appealed.

A city has two classes of powers — one legislative and governmental, in the exercise of which it is a sovereignty and governs its people; and in the exercise of this class of powers the statute must be strictly construed. The other class of powers is conferred upon it for the purpose, not of government, but for private advantage to the city and its inhabitants. In the exercise of these powers it is governed by the same rules that govern private individuals or corporations. See Dillon's Municipal Corporations (3d ed.), 36, and authorities cited in note. In the management and operation of its electric plant a city is not exercising its governmental or legislative powers, but its business powers, and may conduct it in the manner which promises the greatest benefit to the city and its inhabitants in the judgment of the city council; and it is not within the province of the court to interfere with the reasonable discretion of the council in such matters. Questions similar to the one at bar were very fully considered in the cases of *Illinois Trust & Savings Bank v. City of Arkansas,* 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518, *and Pikes Peak Power Co. v. City of Colorado Springs,* 105 Fed. 1, 44 C. C. A. 333. In the opinion in the latter case the court used this language:

"But it is equally true that municipalities and their officers have the power and use of all public utilities under their control for the benefit of their cities and citizens, provided always that such application does not materially impair the usefulness of these facilities for the purpose for which they were primarily created. * * * Where a city has had legislative authority to erect a dam for the purpose of waterworks for the city, it might lawfully lease for private purpose any excess of water not required for its waterworks. This is a just and reasonable rule. It is a rule not inconsistent with any principle of law or equity, and in accord with that good sense and good business principles which recognize as a public good the growth of two blades of grass where but one grew before, and the conversion of waste to use."

It seems to us that this case falls clearly within the rule announced in the foregoing cases, and that the trial court erred in sustaining a demurrer to the answer.

For reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

KENNEDY v. CITY OF NEW YORK.

New York Appellate Division, Second Department — Dec. 15, 1904.

99 App. Div. 588, 91 N. Y. Supp. 252.

1. CONTRACT BETWEEN CITY AND ELECTRIC ILLUMINATING COMPANY — DEFENSE OF CITY IN ACTION ON SUCH CONTRACT. — A city which makes a contract for the furnishing of electric light should not be allowed to escape payment for lighting furnished and accepted thereunder, on the plea that at the time the electric lighting contract was executed there was a contract with a gas illuminating company for the furnishing of gas light, and that the common council of the city had appropriated all of the taxes levied for the lighting purposes for payment of obligations incurred under the contract with the gas illuminating company, when it appears that such an appropriation was not compulsory under the terms of the gas illuminating company's contract, but was an arbitrary act in utter disregard of the obligation flowing out of the electric illuminating contract.
2. SAME — FAILURE OF ILLUMINATING COMPANY TO SUPPLY LIGHT DURING STIPULATED HOURS. — The fact that the electric lighting contract required the lights to be furnished from sunset to sunrise, and that the electric light company only furnished such lights after 1:30 A. M., is not a defense to an action brought by the electric light company against the city to recover moneys due under the contract, where it appears that such contract provided "in case for any reason any of such lamps are not lighted and lights are not furnished during any of the times herein provided or during the hours herein provided for, a rebate *pro rata* according to the time they are not so lighted shall be made from the amount here provided to be paid," and that the city had never contended that such variations from the terms of the contract, concerning the hours during which the electric light should be furnished, were within the quoted provision of the contract.

Appeal by the defendant from a judgment of the Supreme Court in favor of the plaintiff and from an order denying the defendant's motion for a new trial. *Reversed.*

Before HIRSCHBERG, P. J., and BARTLETT, WOODWARD, JENKS, and HOOKER, JJ.

James D. Bell, for appellant.

Hector M. Hitchings, for respondent.

Opinion by JENKS, J.:

Inasmuch as both plaintiff and defendant moved for the verdict, the verdict directed is in effect that of the jury. *Adams v. Roscoe Lumber Co.,* 159 N. Y. 176, 53 N. E. 805; *Smith v. Weston, 159 N. Y. 194,* 54 N. E. 38.

discussed this phase of the question upon the defendant's proposition that the sole source of payment was an appropriation, and that therefore the contract was invalid. In the face of a contract duly made, the city should not be allowed to escape payment for light furnished and accepted thereunder on the plea that there was another existing contract under which the common council had appropriated all of the taxes laid for lighting purposes, when such appropriation was not compulsory by the terms of the gas illuminating contract, but appears to have been an arbitrary act in utter disregard of the obligations flowing out of the electric lighting contract. *Nelson v. The Mayor,* 63 N. Y. 535; *Leonard v. Long Island City* (Sup.), 20 N. Y. Supp. 26; *Kramrath v. City of Albany,* 127 N. Y. 575, 581, 28 N. E. 400.

It is contended that the contract was not fulfilled, because, while in terms it required lights from sunset to sunrise, light was furnished only after 1:30 A. M. But the contract also provided:

"In case for any reason any of such lamps are not lighted and lights are not furnished during any of the times herein provided or during the hours herein provided for, a rebate *pro rata* according to the time they are not so lighted shall be made from the amount here provided to be paid, and in case the light furnished is not equal to the candle power herein provided, a rebate *pro rata* according to the deficiency in candle power shall also be made."

I think that this sufficiently contemplates the variation of the hours of furnishing the light. It does not appear that the defendant or its predecessor ever raised the contention heretofore that the variation was not within this provision of the contract, and it is now foreclosed thereby. *Baird v. Mayor,* 96 N. Y. 567.

The judgment and order should be affirmed, with costs. All concur.

BARTO v. IOWA TELEPHONE CO.

Iowa Supreme Court — Dec. 17, 1904.

121 Iowa 241, 101 N. W. 876.

1. TELEPHONE COMPANIES — CARE REQUIRED. — Though a telephone lineman is of necessity exposed to unusual dangers, it is the duty of his employer to see that the place where he is to perform his work is, in view of the situation, reasonably safe, and it is no excuse to say that an act in violation of this duty was that of another, if with the employer's consent or acquiescence.

reads: "The copy was offered in evidence by the defendant, and received (see Appendix, p. 43)." But examination of Appendix, page 43, does not show any such exhibit. On page 42 there is Exhibit 5, which runs over into page 43, but this is but the resolution which I have heretofore described — that the "mayor and city clerk be, and they hereby are, directed to execute and deliver the proper renewal of said contract according to the terms and conditions thereof."

But assuming that such a contract existed, there is a defective premise in the defendant's proposition. That proposition is: The appropriation for lighting the streets in 1892 was $42,300; the cost of lighting under the prior gas contract was $39,295; ergo, the common council were powerless to execute the electric lighting contract involving payments in excess of the appropriation. Conceding that the sole source of payments upon such a contract was the appropriation, yet the defective premise is that the cost of lighting under the illuminating gas contract was $39,295, which, in order to justify the conclusion, should read that at the time of the execution of the electric lighting contract the existing illuminating gas contract absolutely and necessarily required the application of $39,295. I do not find evidence to justify such premise. We are apprised that the original illuminating gas contract was for lighting street lamps at a fixed sum per lamp. But it does not appear that any total sum was called for or required, or what number of lamps the company was entitled to light irrespective of the power of regulation or reduction vested in the city. The fact that, six months after the execution of the electric lighting contract and the entry upon its performance, the common council, upon a recital of necessity, voted to apply the entire appropriation for the year to the gas illuminating contract, is no proof that it was required to do so by the terms of that contract. For aught that appears, when the electric lighting contract was made there was an appropriation which was subsequently sought to be applied exclusively to the gas illuminating contract. If there was no appropriation applicable in whole or in part, and if the resolve was required by the law in view of existing obligations, then it was incumbent upon the defendant to show those things, instead of interposing this belated resolve, which appears to be arbitrary and not required by law. I have

discussed this phase of the question upon the defendant's proposition that the sole source of payment was an appropriation, and that therefore the contract was invalid. In the face of a contract duly made, the city should not be allowed to escape payment for light furnished and accepted thereunder on the plea that there was another existing contract under which the common council had appropriated all of the taxes laid for lighting purposes, when such appropriation was not compulsory by the terms of the gas illuminating contract, but appears to have been an arbitrary act in utter disregard of the obligations flowing out of the electric lighting contract. *Nelson v. The Mayor,* 63 N. Y. 535; *Leonard v. Long Island City* (Sup.), 20 N. Y. Supp. 26; *Kramrath v. City of Albany,* 127 N. Y. 575, 581, 28 N. E. 400.

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I think that this sufficiently contemplates the variation of the hours of furnishing the light. It does not appear that the defendant or its predecessor ever raised the contention heretofore that the variation was not within this provision of the contract, and it is now foreclosed thereby. *Baird v. Mayor,* 96 N. Y. 567.

The judgment and order should be affirmed, with costs. All concur.

BARTO v. IOWA TELEPHONE CO.

Iowa Supreme Court — Dec. 17, 1904.

121 Iowa 241, 101 N. W. 876.

1. TELEPHONE COMPANIES — CARE REQUIRED. — Though a telephone lineman is of necessity exposed to unusual dangers, it is the duty of his employer to see that the place where he is to perform his work is, in view of the situation, reasonably safe, and it is no excuse to say that an act in violation of this duty was that of another, if with the employer's consent or acquiescence.

2. SAME. — If a telephone company permits an electric light company to use its poles, it must see that its employees are not exposed to perils the risk of which was not assumed.
3. CARE, DEGREE OF. — Those using electricity must exercise a degree of care and skill in the construction and maintenance of necessary apparatus and machinery commensurate with the dangers involved.
4. DUTY TO INSPECT WIRES. — Where wires are so placed that the insulation may be expected to wear off at short intervals, because of coming in contact with other materials, and where loss of insulation renders them dangerous, inspection should be made with such frequency as appears reasonably necessary to discover and remedy defects, to the end that injury may not result therefrom.
5. INJURY TO TELEPHONE LINEMAN — NEGLIGENCE. — Where a telephone lineman was injured by contact with electric light wires which the telephone company allowed to be fastened to its poles, it was *held* that the question of defendant's negligence was for the jury.
6. SAME — ASSUMPTION OF RISK. — A telephone lineman, who was not an inspector and was ignorant of the method of testing live wires, cannot be held to have assumed the risk, as a matter of law, of injury from an electric light wire fastened to the telephone pole by an electric light company.

Appeal by defendant from a judgment for plaintiff. *Affirmed.*

A. Van Wagenen, for appellant.

Henderson & Fribourg, for appellee.

Opinion by LADD, J.:

On the 18th day of April, 1901, the plaintiff was employed as lineman by defendant and was engaged in stringing what are called "lead offs," being connections from the main line of telephone wires to residences or places of business of patrons. After ascertaining the wires with which to connect a laundry near the intersection of Court and Fourth streets he advised the wire chief, and was informed that a certain telephone was connected with a metallic circuit when it should have been a common return. In a metallic circuit two wires run all the way from the telephone to the central office, while in a common return one wire runs from the office to the telephone, and the current travels back over a wire common to several telephones, sometimes called the "McClure" wire. Plaintiff, in proceeding to remedy the defect, climbed the pole on which, about thirty feet from the ground, were two crossbars, and above these a "hickey" had been placed by the Sioux City Electric Light Company. A "hickey" consists of two iron strips fastened to the pole and extending above

its end, supporting a crossbar. On this crossbar there were two electric light wires of 110 volts and two primary wires, connecting alternating currents of 1,050 volts each. A wire tapped one of these and ran down to the middle bar, and, after being wound around a peg, onto the fuse box, which was attached to the lower crossbar west of the post, and over the end of a supporting brace extending from the pole to the crossbar. The fuse box was six inches long by three or four inches wide, and is described as "fusable plug down in a receptacle to blow out or melt out in case of a short circuit on the line." A substance of lower conductivity than the wire is placed in it, and melts when two wires come together. A converter was attached to the north side of the pole, the top of it at the middle of the lower crossbar. This was about eighteen inches high and twelve or fifteen inches wide. Its purpose was to convert the current from a higher into others of lower voltage. In this instance the current passing into a store nearby was reduced to 104 volts. A connecting coil, about one and one-half inches in diameter, of wire three thirty-seconds of an inch thick, extended from the fuse box to the converter. Back of this wire was the iron brace previously mentioned, and as the coil was longer than seems to have been necessary it is supposed to have been blown back and forth by the wind against the brace until the insulation wore from the wire. The telephone wires were stretched over the middle and lower crossbars, save the common return, which was attached to a bracket fastened on the east side of the pole at the lower end of the brace supporting the middle crossbar. The plaintiff cut the return wire of the metallic circuit and attached it on the common return, which was on the bracket. He then had hold of the bracket with one hand, and in descending grasped the iron brace of the wire coil connecting the fuse box and the converter, when, as the evidence tended to show, he was struck by a current of electricity and fell to the earth.

1. The hickey, electric light wires, fuse box, and converter were placed on the pole without the defendant's consent, but, as these had remained thereon more than a year, it may well be assumed to have been done with its acquiescence. That they were so placed by another company did not relieve the defendant of its duty to take reasonable precautions for the safety of its employees.

Though the lineman is of necessity exposed to unusual dangers, it is the duty of the employer to see that the place where he is to perform his work is, in view of the situation, reasonably safe; that is, shielded from such perils as an ordinarily prudent and skilful man would under like circumstances, guard against, and it is no excuse to say that an act in violation of this duty was that of another, if with the employer's consent or acquiescence. In other words, the obligation to provide the employee a reasonably safe place to work is an affirmative and continuing duty on the part of the employer. If the defendant chose to allow the electric light company to use its poles, it became its duty to see that these were not so used as to expose the telephone company's employees to perils the risk of which was not assumed in entering such hazardous employment. See *McGuire v. Bell Tel. Co.,* 7 Am. Electl. Cas. 769, 167 N. Y. 208, 60 N. E. 433, 52 L. R. A. 437; *Cherokee, etc., Coal Co. v. Britton* (Kan. App.), 45 Pac. 100; *Trainor v. R. R. Co.,* 137 Pa. 145, 20 Atl. 632.

Counsel have stated in eloquent terms the advantages of electricity. The power supplied by it and manifested in different ways is now in common use. Its economic advantages are immeasurable. Its possibilities are inconceivable. But unless properly handled it is also exceedingly dangerous, and those utilizing the agency cannot complain if a degree of care and skill in the construction and maintenance of necessary apparatus and machinery is exacted commensurate with the dangers involved. *McAdam v. Cen. R. & E. Co.,* 6 Am. Electl. Cas. 348, 67 Conn. 445, 35 Atl. 341. See *Overall v. Louisville E. & L. Co.* (Ky.), 7 Am. Electl. Cas. 521, 47 S. W. 442. Such is the rule with re-

tion renders them dangerous, inspection should be made with such frequency as appears reasonably necessary to discover and remedy defects, to the end that injury may not result therefrom. The lineman necessarily ascended on the opposite side of this pole, and when in that position his view of the wire was obstructed by the location of the fuse box, converter, crossbar, and brace, and he would not be likely to search for a wire on the other side, not fastened to, but swinging against, the brace, especially if ignorant of the mechanism of the fuse box and converter. The defendant must be presumed to have known what every one else has observed, that linemen in going up and down poles take hold of the braces and other projections which do not appear to be dangerous, and in placing or permitting others to place wires and apparatus on these poles should have taken this custom into consideration in guarding against exposing its employees to unnecessary peril; and whether it did, in view of all the circumstances, exercise ordinary care and skill in so doing, was for the jury to decide.

2. That plaintiff assumed the risks incident to his employment no one questions. Had he been an inspector, or had the inspection of the poles and wires been a part of his duties, there would be much force in appellant's contention that he should be held to have known what it was his duty to ascertain. See *Anderson v. The Inland Telephone & Tel. Co.* (Wash.), 7 Am. Electl. Cas. 725, 53 Pac. 657, 41 L. R. A. 410; *Chisholm v. The New Eng. T. & T. Co.*, 176 Mass. 125, 57 N. E. 383; *Bergin* v. *New Eng. Tel. Co.* (Conn.), 38 Atl. 888, 39 L. R. A. 195; *New Omaha T. H. E. L. Co. v. Rombold* (Neb.), 8 Am. Electl. Cas. 654, 97 N. W. 1030. But he was not an inspector, and the record is void of any evidence upon which it could have been found that inspection was a part of his duty. True, he was required to report any defects he might observe, but he was not directed to look for them; was not furnished with any apparatus to test live wires; did not know how, and was even ignorant of the method of testing by touching with the end of his fingers. Indeed the testimony tended to show that this was the only telephone pole in the city with a converter and fuse box attached to it, and that, though plaintiff appreciated the danger of coming in contact with electric wires, he had had no experience in protecting himself from them. Doubt-

reads: "The copy was offered in evidence by the defendant, and received (see Appendix, p. 43)." But examination of Appendix, page 43, does not show any such exhibit. On page 42 there is Exhibit 5, which runs over into page 43, but this is but the resolution which I have heretofore described — that the "mayor and city clerk be, and they hereby are, directed to execute and deliver the proper renewal of said contract according to the terms and conditions thereof."

But assuming that such a contract existed, there is a defective premise in the defendant's proposition. That proposition is: The appropriation for lighting the streets in 1892 was $42,300; the cost of lighting under the prior gas contract was $39,295; ergo, the common council were powerless to execute the electric lighting contract involving payments in excess of the appropriation. Conceding that the sole source of payments upon such a contract was the appropriation, yet the defective premise is that the cost of lighting under the illuminating gas contract was $39,295, which, in order to justify the conclusion, should read that at the time of the execution of the electric lighting contract the existing illuminating gas contract absolutely and necessarily required the application of $39,295. I do not find evidence to justify such premise. We are apprised that the original illuminating gas contract was for lighting street lamps at a fixed sum per lamp. But it does not appear that any total sum was called for or required, or what number of lamps the company was entitled to light irrespective of the power of regulation or reduction vested in

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121 Iowa 241, 101 N. W. 876.

1. TELEPHONE COMPANIES — CARE REQUIRED. — Though a telephone lineman is of necessity exposed to unusual dangers, it is the duty of his employer to see that the place where he is to perform his work is, in view of the situation, reasonably safe, and it is no excuse to say that an act in violation of this duty was that of another, if with the employer's consent or acquiescence.

Plaintiff averred that while his son was so riding as a passenger on the car it was so defective that there was a loud and dangerous explosion of electric energy, endangering the life and limbs of passengers, filling the car suddenly with light and fire, whereby his said son either rushed from the car to escape the imminent threatened danger, or was thrown from said car and fell striking his head on the rail, and breaking his skull; that he lingered from the 17th until the 23d of February, 1903, when he died from said injuries.

Plaintiff alleged that the loss of his son was caused by the defendant's negligence and breach of contract; that it could have prevented said injury, and did not do so; that there was no negligence nor fault on the part of his son.

Defendant answered, and, after pleading the general issue it denied specially that the death of plaintiff's son resulted from its negligence or want of care, but averred that, on the contrary, his injury, suffering, and death were due entirely to his own want of care and caution and gross negligence in the premises. In the event that any contributory negligence should appear in the case, defendant averred that deceased was guilty of contributory negligence, and brought about his own injury.

The case was tried by jury, which returned a verdict in favor of the defendant.

A motion for a new trial, based on the ground that the verdict was contrary to the law and the evidence, being overruled, judgment was rendered in favor of the defendant, and plaintiff appealed.

Opinion by NICHOLLS, J.:

The evidence shows that on the morning of the 17th February, 1903, at about 4:30 o'clock in the morning, while it was yet dark, Jerome Chretien, a son of the plaintiff, entered as a passenger, at the corner of Esplanade and Mystery streets, one of the electric cars owned and operated by the defendant. As the car moving forward later approached Crete street, the trolley

evidently upon a first impulse) ran outside of the car upon the rear platform, and jumped from it into the street. The car was moving at the time with speed, and Chretien, as he touched the ground, fell with such force as to fracture his skull, and from this fracture, after lingering a day or so, he died. Had he remained upon the car, he would have received no injury. There were in the car at the time of the falling of the wire four persons, two of the four being men employed by the defendant company as conductors, who were on the way to take up their employment for the day, Chretien, and one passenger besides himself. On the front and rear platforms of the car were its conductor and motorman at their stations. No one of these men was hurt in the slightest degree, and none save Chretien were at all frightened or made apprehensive by what had occurred. The car itself was not injured, nor does any part of it appear to have been even scorched. The testimony of the persons who were inside the car was at variance with that of Pourpart, one of plaintiff's witnesses, as to the car being enveloped on the outside by light or flames.

The current being cut off by the falling of the wire, the car stopped as soon as it lost the momentum which it then had. A repair force was immediately telephoned for by the conductor, which reached the place in about fifteen minutes.

The man in charge of the repair work found that a trolley wire had fallen, one end of which was lying behind the car and between the tracks, crossing one of the rails; the other end still attached above. An examination disclosed the fact that the end of the fallen wire had become annealed for some considerable distance, which annealing, under the evidence, had the effect of softening the wire and rendering it pliable, so that it could be easily twisted, and also of discoloring it.

The evidence of neither the plaintiff nor the defendant disclosed what occasioned the falling of the wire. Plaintiff's counsel suggests that the wire was inherently weak, and that the annealed condition of the wire showed it must have been injured before the accident; but the evidence establishes, we think, that that condition followed as the result of the falling of the wire, and was not its producing cause. Defendant's evidence shows that there had been no defect in the wire apparent to the eye prior to the

accident; that everything seemed right upon the line; and that it had been quite recently thoroughly and closely inspected.

Whatever may have been the cause, it is clear that the accident in itself and of itself was harmless. Assuming that defendant company was in point of fact in some way careless in respect to the wire, it would by no means follow that because of such carelessness it would be responsible for the injury of Chretien. If the connection between the falling wire and Chretien's injuries was simply that the latter, springing from an electric car running at high speed into a stony street, upon his assumption that by the falling of the wire he would be placed in danger of his life, or would receive great bodily harm, the company could not be held liable for his acting upon a wrong assumption when the circumstances of the case were not such as would have given rise reasonably to such assumption or apprehension on the part of an ordinarily prudent and careful person. The plaintiff states the position he contends for in the syllabus of his brief as follows:

"If a railrad company so operates its trains as to place its passengers in a position apparently so dangerous and hazardous as to create in their minds a reasonable apprehension of peril and injury, and thereby excite their alarm, and induce them to make efforts to escape, and in such efforts they receive personal injury, it is responsible in damages," etc. *Green v. Pacific Lumber Co.* (Cal.), 62 Pac. 747; *Wanzer v. Railway Co.* (Wis.), 84 N. W. 423; *Railroad Co. v. Hicky*, 5 App. D. C. 436; *Meesel v. Railroad Co.*, 90 Mass. 234; *Bischoff v. Railway Co.* (Mo.), 25 S. W. 908; *Kermon v. Gilmer* (Mont.), 2 Pac. 21.

Defendant contends that the principle controlling the decision of this case is a familiar one, and that it has been applied by the court in several cases, but that the exact question presented by the facts has not yet been passed upon here. Counsel cite *Lehman v. Railroad Co.*, 37 La. Ann. 708; *Odom v. Railroad Co.*, 45 La. Ann. 1204, 14 So. 734, 23 L. R. A. 152; *Russel v. Shreveport R. Co.*, 50 La. Ann. 501, 23 So. 466; *Stokes v. Saltonstall*, 13 Pet. 191, 10 L. Ed. 115; *South Covington & Cincinnati St. R. Co. v. Ware*, 84 Ky. 270, 1 S. W. 493; 2 Rorer on Railroads, pp. 1092, 1093; Pierce on Am. Railroad Law (1st ed.), 475; Id. (later ed.), 329; Thompson on Negligence, vol. 2, p. 1092 (early ed.); Beach on Contributory Negligence (3d ed.), §§ 40, 41; *Card v. Ellsworth*, 65 Me. 547, 20 Am. Rep. 722; *Shannon v. B. & A. R. Co.*, 78 Me. 52, 2 Atl. 678; *Twomley v. Central Park R. Co.*, 69 N. Y. 158, 25 Am. Rep. 163.

Plaintiff's counsel say:

"That through some defect the trolley wire or electric conductor through which the electric energy was conveyed to the motor broke and fell upon the car, and caused a sudden blaze of light, apparently enveloping the car, and a loud noise or report, as of an explosion. Chretien had reasonable cause to apprehend that his life was in imminent danger from electricity, and that he was in great danger of instant death, and seeking to escape from that danger, he jumped from the car and fell, and struck his head on the rail, fractured his skull, and after lingering, died."

Defendant's counsel insist that, conceding for argument (which they did not in fact admit) that the company had been guilty of negligence in not preventing the falling of the wire, the question for examination was whether the circumstances were such as to create in the mind of an ordinarily prudent person a reasonable fear or apprehension of bodily injury. They say that they were not of such character. They assert that:

"Neither the motorman nor the conductor left their positions, and, judging by the evidence, no other person in the car attached any importance to the incident. It apparently made no impression on them of fear or danger. * * * The jury evidently did not believe the version of Pourpart (one of the plaintiff's witnesses) that the car was surrounded by flames covering it from top to bottom, and they were justified in that conclusion; and the most perfect contradiction was the fact that there was no mark on the body of the car showing the presence of fire, flames, or smoke."

The sudden going out of the lights in an electric car is not an unusual occurrence. Any one who travels in those vehicles has undergone the experience, and must have noticed the movement of the light when the trolley is adjusted to the wire, and must have heard the popping or blowing out of a fuse. Counsel maintain that, even if Chretien left the car under the agitation of fear and apprehension, he was not justified in so acting, and this notwithstanding the company may have been primarily guilty of negligence in causing the fear or apprehension; that it was not every trivial or commonplace accident happening in or with the vehicles of locomotion which would justify one in taking such desperate chances as he took. The law did not allow one to do a thing of this kind, and recover, even though the railroad company was in fault. Under the settled jurisprudence, Chretien is shown to have acted in a manner unusual and extraordinary, without sufficient justification or provocation, and his unfortunate accident could not be attributed to the defendant.

The following language, which defendant's counsel quote as having been used in the case reported in 84 Ky. 270, 1 S. W. 493, meets with our approval:

"The character of the impending danger, or at least its apparent character, is to be considered. If one acts unreasonably, rashly, or becomes frightened at a trivial occurrence not calculated to alarm a reasonably prudent man, and thereby brings injury upon himself, there is no liability. It is urged that when one is frightened by something resulting from the neglect of the carrier he cannot be charged with contributory negligence to any accident. He, however, must act upon reasonable apprehension of peril. His conduct must conform to that of an ordinarily careful man under like circumstances. He has no right, upon the happening of some trivial occurrence, or such as would not create fear or apprehension of injury in the mind of an ordinarily prudent and careful person, to bring injury upon himself, and then recover damages by reason of it."

We also recognize the force of the proposition that in considering whether there was justification for the passenger's action it is proper to consider what the action of the other passengers was as a part of the *res gestæ,* and what was deemed prudent by those in the same situation having an interest to take the least and avoid the greatest hazard. One of the tests of justification, among others, is to determine what careful persons generally would be likely to do in similar circumstances. The speed of the train, and the other circumstances connected with the occurrence, are also proper to be considered. 78 Me. 52, 2 Atl. 678; 69 N. Y. 158, 25 Am. Rep. 163.

The jury in the present case was obviously of the opinion that Chretien's conduct in jumping from the car, as shown by the evidence, was not justified by a reasonable apprehension entertained by him from the surrounding circumstances that his life was in danger, or that he was in danger of great bodily harm. There is nothing in the evidence which would warrant or justify us in declaring that the jury's conclusions were erroneous.

Finding no error, the judgment appealed from is hereby affirmed.

DAYTON v. CITY RAILWAY CO.

Ohio Circuit Court — Dec. 22, 1904.

26 Ohio Cir. Ct. 736.

1. ELECTROLYSIS — INJUNCTION. — A city may enjoin an electric street railway company from so operating its lines as to allow escaping electricity to destroy water pipes.
2. CHANGE TO ANOTHER SYSTEM. — Equity will not compel an electric street railway company to change to another system when the evidence is conflicting as to whether the present system is proper.
3. NEGLIGENCE OF THIRD PARTIES NO DEFENSE. — The fact that another electric railway, operated in the city by the same system, is in part responsible for the injury to the city's water pipes, constitutes no defense.
4. ACTUAL NEGLIGENCE — LIABILITY OF STREET RAILWAY. — A street railway operating under a grant from the city to equip its lines with a single trolley system is liable to the city only for actual negligence. In granting such right the city cannot be taken to have contemplated and condoned by anticipation, any mischief arising from the reasonable use of said system.

Appeal from Montgomery common pleas court.

E. P. Matthews, city solicitor, for plaintiff.

McMahon & McMahon, for defendant.

Opinion by SULLIVAN, J.:

This cause was at a former term heard upon the transcript of the testimony taken in the court below and depositions taken upon the appeal.

Electrolysis. — The above case seems to be the only reported decision where the courts have considered the question of damages resulting from electrolysis.

In the case of *Lowrey v. Cowles Elec. Smelting & Aluminum Co.*, 68 Fed. 354, 366, Judge TAFT said: Electrolysis is a chemical dissolution caused by an electric current. Whenever a current of sufficient quantity and intensity is passed through a chemical compound in a fluid condition, it will cause a chemical disruption, and one of the elements will go to the anode, or the place at which the current enters the fluid mass, and the other will go to the cathode, or the place where the current leaves it."

"Electrolytic action will take place wherever a current of electricity leaves a conductor which is capable of being oxidized (such as cast or wrought iron, or lead water pipes) and passes into some other conducting medium in the presence of more or less dampness except in cases where the current passes directly from one metal conductor to another by direct metallic contact.

"Thus it will be found that wherever a current of electricity leaves a line of water pipe and passes into the surrounding earth, or water, either to follow

Omitting the several averments of the petition admitted by the defendant, those controverted by the defendant, stated substantially, are as follows:

That the railway company has not furnished a metallic circuit, for the return, to the power house of the electricity having been used to propel its cars, and hence the current is thus left to return as best it can. It escapes from the rails to the earth, and a division of the current takes place, the water pipes of the city receiving a part.

That the railway company so imperfectly and inefficiently connected the rails of its tracks, that the return current, in a number of places, leaves the rails, escapes into the earth and to the water pipes of the city, and thence back to the earth or rails. That at the points where the return current quits the water pipes, returning to the earth or to the rails, the pipes are decomposed, the metal of the pipe removed, and then is left simply the soft material of the chemical compound constituting the pipes. By this action the

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some other path or to return to the pipe after passing some obstacle offering electrical resistance, such as an imperfect joint, more or less electrolytic action will be taking place, depending upon the volume of current leaving the pipe. This electrolytic action will result in the corrosion and more or less rapid eating away of the pipes at the point where the current is leaving which will in time cause the pipe to fail." (Guarding against Electrolysis of Underground Pipes, by Putnam A. Bates, in 47 Electrical Review 737.)

General References. — Since there are no other reported cases the following references to well-known authorities are given:

Guarding against Electrolysis of Underground Pipes, by Putnam A. Bates, 47 Electrical Review, page 737. In this article the author shows the results of certain tests made to determine the presence and direction of flow of leakage currents between the tracks and power house of a company and the gas mains, water mains, hydrants, and service pipes.

Electrolysis of Underground Conductors, by Prof. George F. Sever, Columbia University, vol. 3, Transactions of International Electrical Congress, pages 666–692.

In this article the author has collected all the available material and presented the same in five tables:

Table I shows the street railway practice in the United States regarding the use of return feeders and the effect of increasing the capacity of these feeders.

Table II shows the recommendations which have been made to municipalities by electrical engineers. The results of these recommendations are shown in a few cases.

Table III shows the most essential electrical features of the municipal ordinances which are in force in certain municipalities.

pipes in some instances have been perforated with holes, at other points split, and in some instances wholly ruined, and in every case weakened.

That the city has already been compelled to dig up and replace by new pipe, at a number of places, where the pipes have been destroyed or so weakened by the action of the return current as described, as to render them unsafe and inefficient to carry the water, and especially under the pressure necessary in case of conflagration. That the injury is still being done and will continue unless the railway company is required to adopt some method to prevent it, and hence is a constant menace to its own property and the lives and property of its citizens.

That points where this damage is being done and the extent of it are not accurately known to the city, and cannot be known without digging up all of its pipes. Hitherto notice of the injury being done has been brought to the city by leaks from the breaks, and hence not until the damage in such instances was completed; that the injury, if continued, will still be greater, and that it is without the power of the railway company to adopt methods for

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Table IV presents a summary of the opinions of municipal officers.

Table V presents a summary of expert opinions concerning electrolysis.

Cause and Effect of Electrolytic Action upon Underground Piping Systems, by A. A. Knudson, Electrical Engineer, New York City, vol. 15, Journal of New England Water Works Association, pages 244–271.

In this article the author treats the subject under the following heads:

1. Cause of deflection of currents from well-bonded tracks to water mains.
2. Acute points of deflection of currents to water mains.
3. Effect of joint resistance on water mains.
4. Effect upon water mains in a positive district.

Electrolysis and Its Prevention, by Albert B. Herrick, Consulting Engineer, and Edward C. Boynton, General Manager of Crange County Traction Company, American Electric Railway Practice, page 387.

This article is illustrated and gives a general idea of the nature and effect of Electrolysis.

The following books are also instructive as to the limiting of liability for electrolysis: Standard Hand Book for Electrical Engineers, page 898; Electric Railroading, page 278.

Electric Railway Hand Book, pages 258–360, contains an illustrated article which gives a method for determining whether Electrolysis does take place on underground metallic surfaces.

Stray Currents from Electric Railways, by Dr. Carl Michalke. Translated by Otis Allen Kenyan.

This volume of about one hundred pages is a scientific and well-illustrated treatise and gives references to all the valuable material upon the subject.

the return of the electric current after use that will wholly prevent its continuance; that the city advised the railway company of the injuries done and of their continuance, and of the city's inability to do anything to prevent them, and demanded of the railway company that it adopt methods known to it to prevent them. But the railway company has taken no steps and still neglects, to adopt some method to prevent the injury being done; that the city is without an adequate remedy at law and therefore prays that a mandatory injunction may issue commanding the railroad company to adopt such methods as will wholly prevent the injuries to the water pipes of the city set forth in its petition.

The railway company in its answer sets forth two defenses:

First, it denies that the rails of its track are not perfectly connected or bonded, avers that it has adopted and keeps in use the best known systems as they are invented. As to whether the decomposition of the water pipes takes place by the action of its return current, as averred in the petition, it has no knowledge, and therefore denies that it does.

It denies that it can adopt any system to prevent such action of its return current without the concurrence of the city; denies that it knowingly or purposely uses the water pipes of the city for such purposes, or that the city has ever proposed any plan to remedy the evil.

The second defense sets forth that it purchased the Dayton street railroad and Fifth street railroad in 1893, being two systems of street railway theretofore operated in said city by horse power, [illegible] grants to the respective companies, to be found in [illegible] this defense, also the ordi- [illegible] companies

of the city authorities; that the essential part of this system was the use of the rails to carry the current back to the powerhouse, and the only system in use in the United States, and at the time was regarded as the only practical system for the operation of electrical railways. It was more economical and much simpler than any other known system, less dangerous to employees, indorsed by the Supreme Court of the State, and had the approval of scientific and practical men throughout the country; and in the city of Dayton the street railway known as the White Line had been in operation under the same system theretofore for the period of seven years.

It is averred in this second defense, since the grants to the defendant and the equipment of its lines with the single trolley, the city has granted to other street railway companies the use of its streets to construct and operate street railways with the same system for the application of electricity as a motive power — nine in number — with power houses within the city, the lines of which railways cross and intersect with those of the defendant and each other.

Its legal obligation to use reasonable care to prevent the electricity escaping from its rails to the water pipes of the city is admitted, but it avers it has exercised such care and diligence.

It is also averred that it proposed a method of protection and to remedy the claimed mischief to the city officials, but this proposition was declined, and none was ever proposed or suggested by the city. That the petition of the city does not inform the defendant what system the court should compel the defendant to adopt.

The defendant admits knowledge of the system of double trolley being in use in the cities of Cincinnati and New York, and the conduit system in the city of Washington, District of Columbia, but claims that the adoption of either system would not obviate the danger or protect the water pipes of the city, so long as the other street railways in the city mentioned operate with the single trolley. It claims that the conduit system is impracticable and that the double trolley would involve an outlay of a very large sum of money, in the reconstruction of its road, so as to receive such equipment, largely increase the operating expenses of its road, largely increase the danger to its employees, requiring the use of

so large a number of additional wires as to greatly increase the difficulty of handling fires.

In this defense the railway company avers that there are various methods by which the city can protect itself, and the danger can be entirely obviated if the city would act in concern with the defendant, which the defendant is willing to do. It knows of no way by its own action to prevent the electricity used by it from escaping except to keep its tracks in good repair and properly bonded. It claims to have always done this and is ready always so to do. That in locating the tracks of the city railway, as well as its water pipes and connections, and effort to prevent the escape of the cement would be entirely futile.

The defendant claims in this defense that the several ordinances constituting the contract between it and the city, and in pursuance thereof, the city through its official supervised the construction of its road to be equipped and the equipment of its road with the single overhead trolley, and the same being approved and acquiesced in by the city officials, and relying thereon it expended large sums of money in the construction of its road to receive said equipment and in equipping the same therewith; that by the contract it had the right to the use of its rails as a return current. The city not having repudiated its contract, this court is without authority to compel the railway company to make any change in the construction and equipment of its road. It further avers that the city has not in any of its departments taken any action requiring the change, and the railway company would be without

to the defendant's operating its road by the single trolley so far as affecting the property of the city was concerned; denies that any of the grants were for single trolley. Avers that the grants were general, to use animal, electrical or cable power, and unless implied in this general grant the defendant has no authority to use the single trolley; that their general grants to the railway company the city did not intend nor did it authorize the railway company to use the single trolley or any other system that would damage the property of the city or its citizens. The city avers that the railway company had known for six years that the single trolley system interfered with the water pipes; that the electricity escaping from the rails of its tracks caused the injury of which the city complains, but continued the use of the system and refused to take any steps to prevent further damage. That the railway company at the time it equipped its road with the single trolley knew that a portion of the current used by it would pass from the rails to the earth and return along the water pipes.

The city admits that there was a conference between its officials with the defendant and other street railway companies within the city; but avers that the defendant and the other companies only offered to make certain metallic connections between the water pipes and the power houses, but because such connections would not prevent injury to the water pipes of the city or remove the mischief, the city decided to have it done and at the same time urged and insisted that the defendant and the other companies should adopt and use the double trolley. That whilst believing that the double trolley would prevent the injury being done, yet the city would be satisfied with any other system that would render the pipes immune, that would not obstruct the streets or do damage to the city's property or that of its citizens; avers that at the time of filing the petition in this case suits were also instituted against the other street railways in the city using the single trolley system.

It then avers that no action on part of the board of city affairs or the city council is necessary to authorize the suit brought; but that the officers of the city have not only requested but demanded of the defendant that the method of operating its road be so changed and modified that no further damage will result to the water pipes of the city, to its property, or to the property of its

citizens, and upon failure to do so that suit be brought against defendant to compel it to comply with the grant and use electricity as a motive power in such a way as not to endanger the property of the city or its citizens. It then sets forth the necessity of waterworks for the protection of the city, property and the lives and property of its citizens in all the streets occupied by the defendant; that the water pipes were in most of the streets before the railway of the defendant was established and constructed, and avers that it is not possible for the defendant in the use of any bonds known to exist to prevent the current escaping from the rails to the earth and thence to the water pipes so long as defendant uses the single trolley system.

It then denies each and every allegation of the railway company's second defense not specially admitted in the reply, and renews the prayer of its petition.

The railway company contends that the city could not appeal to the courts to give it relief by a change of system without first, having by proper authorities passed proper ordinances ordering a change in the system with permissin to the defendant to do the things necessary to accomplish a change.

If the change demanded was definitely specified in the ordinance and not complied with, then action could be brought to compel a change if the council had power to order a change.

All the city did was to pass a resolution authorizing a suit to compel some system that would not damage the pipes. With nothing more the defendant contends that the court cannot grant

the city in the operation of its railway and thereby injure and destroy the property, and, if a change to the double trolley or some other system is necessary for that purpose, the court should order it done. That the demand of the city that the railway company adopt some system that will prevent the electric current, or its return to the power house of the company, escaping to and using the water pipes of the city as a return path, is simply asking that it be required to comply with the implied terms of the grant, and not asking the court to exercise police powers and, hence, no legislation by the city is necessary for such action, as full authority is found in the statute authorizing it. The relief, if any, the city may be entitled to, arises upon the proof in the case. The testimony, taken upon the issues between parties and presented here upon transcript and depositions, covers some three thousand pages of typewritten matter — too voluminous to be set out in detail in this opinion, and, therefore, we shall not attempt to do more than make occasional reference to particular parts of it bearing directly upon facts we think proven by it.

At the time the defendant equipped its road with the single overhead trolley was thought to be, and so pronounced, by persons experienced in the use of electricity as a motive power for the operation of street railways, as compared at least with the double trolley, the more simple, less liable to disarrangement, much cheaper, less liable to accident in blockading cars and less dangerous to its employees, and the most approved. There was but one road in the United States operated by the double trolley. It was contemplated by the parties at the time that, in the application of the current as a motive power, poles and wires were to be used, as the grant specifies the kind of poles, the distance the same were to be set apart and that the location of the same was to be decided by the city's engineer.

It also provided how high above the surface of the streets the wires used to convey the current to the cars should be suspended. Therefore, it was contemplated that the equipment was to be a trolley system. Part of the process of equipment was to be under the supervision of the city's engineer. The work proceeded and was of a character that necessarily required personal observation of the authorized officials of the city during its progress. The streets were torn up and their use by travelers necessarily at times

interfered with, and the material necessary to the equipment by a single trolley placed upon the streets in plain view, and at the time, and, since the equipment of the defendant's road, several other street railways within the city, under special grants of the city, have been equipped with, and are now operated by, the same system. The White Line began operating with the same system in 1888, and in 1893 injury by electrolysis to lead service pipes was discovered. The testimony does not show that this injury was due to the system; in fact, it does not seem to have attracted much attention.

In September, 1893, a representative of the waterworks was sent by the city to a convention of the American waterworks, held at the city of Milwaukee, where electrolysis to water pipes was discussed. Whether the discussion included observations made where single trolley systems were in use, the testimony does not show. If it did, this representative does not seem to have been impressed with any claims made that it would occur where such system was used or he failed to convince the waterworks board that electrolysis to the pipes was likely to occur; for, in the year 1894, the railway company, partly under the supervision of the city's officials and under the observation of all, as above stated, equipped its road with that system.

These facts are fully established by the testimony and prove, as we think, that the grant was for the single overhead trolley.

The testimony shows that it was then known to the parties that a constituent part of his system was the use of the ground circuit and that portions of the current are unavoidably diverted through whatever conductors are in proximity, having themselves grounded circuits, returning to the source in which it originated. What, if any, injury would result by electrolysis, or whether it would occur in any such proximate conductors, was not known by the parties. The testimony shows that a sufficient quantity of the current, on its return to the power house of the company, is diverted to the water pipes of the city to injure them and, in some instances, destroy them.

The lines of the defendant's railway at several points within the city, cross steam roads and also street railways operated by electric motive power, also cross the Miami river at two different points, one on a bridge part wood and part iron, and the other on

a bridge solely of iron. At other points they cross streets where hoist bridges are used. All these present serious difficulties to be overcome in providing for the return current. Some of the bridges will not permit the use of the standard rail on account of the structure of the bridge being light. The unavoidable shaking of the bridges by the passage of the cars makes it impossible to perfectly bond the rails; and, at the intersections and crossings of other roads, the pounding of the passing cars upon the intersecting joints makes it very difficult to maintain perfect connection at such points for the return current, and all these difficulties tend to increase the resistence of the rail path and facilitate a diversion of the current to other conductors.

The decided weight of the testimony in the case shows that the bonding of the entire road of the defendant is not only inadequate, but very poor, and very far below the present standard of the art, and, as we have already seen from testimony, this to a very great extent raises the resistence of the rail path, facilitating a diversion of the current to proximate conductors and, where the water pipes of the city are in proximity to the rail, they receive a portion of the diverted current. It is undisputed that the return feeders in use at the bridges across the river at points already named are not sufficient to prevent a diversion of the current at those points, and that the use of ground plates for the return current has been wholly inefficient and has been almost universally abandoned. It is also undisputed, if these several omissions were supplied and the difficulties at the bridges and railway crossings could be overcome, much less of the current would be diverted from the rail path.

There is a sharp conflict in the testimony as to the amount of current sufficient to cause electrolysis. Upon this question the views of the experts are widely apart. This is true, even where the opinions are based upon the same facts and conditions.

If the construction of the company's road is brought up to the present standard of the art, the best known appliances used and the road kept in repair and operated with reasonable care, no witness pretends to say that the mischief would not be obviated, except certain experts who claim that the mischief will continue so long as the single trolley is used, admitting, however, that if the road was brought up and operated according to the present

standard of the art, much of the mischief would be overcome. How much of the mischief is traceable to either, they do not advise the court.

The first notice that electrolysis had occurred to any of the water pipes of the city was the water escaping from breaks in the pipes and coming to the surface in the street. It is likely to occur at any point where the pipe is potential to the rail. Where such points are and how far the injury may have progressed, unless a break has occurred, could be discovered only by digging up the pipes.

It must be conceded that the defendant has the right to a reasonable use of the power granted it by the city, and such use must be exercised with due care; but it is not made clear how the court is to determine whether the railway has abused the franchise in the selection of the system adapted for the application of the electrical current, when the testimony offered shows that part of the mischief is due to the negligent construction and operation of the road; and how much is traceable to these causes the testimony fails to show.

In view of the fact that the expert witnesses differ as to the quantity of current sufficient to cause electrolysis, how can the court say that, after the construction of the road is up to the present standard of the art and is operated with due care, the current then diverted, if any, to the water pipes of the city will cause electrolysis or constitute actual negligence on the part of the railway in the use of the single trolley?

The case presented does not authorize the court to require defendant to change to another system.

The faulty construction of the defendant's road and negligent operation of the same result in a continual damage to the water pipes of the city for which it has no adequate remedy at law.

The fact that other electric railways operated in the city by the same system are in part responsible for the injury to the city's water pipes constitutes no defense for the defendant.

The defendant will be enjoined from operating its road in the condition shown by the evidence, and from negligently operating the same.

Jurisdiction of the case will be retained, to give the defendant an opportunity to show what, if any, improvement it has made since the cause was submitted to this court, in the way of bringing up the construction of its road and in operating the same.

The question of costs of the appeal is reserved.

WILSON and DUSTIN, JJ., concur.

ROWE v. TAYLORVILLE ELECTRIC CO.

Illinois Supreme Court — Dec. 22, 1904.

213 Ill. 318, 72 N. E. 711.

1. DEATH OF LINEMAN — SHOCK FROM ELECTRIC LIGHT WIRE — CONTRIBUTORY NEGLIGENCE. — A telephone lineman received a shock from a telephone wire coming in contact with an electric light wire and fell to the ground breaking his neck. If he had used his safety strap he would not have fallen. *Held*, that if the shock was sufficient to kill him, it was immaterial whether he fell or not.
2. INSULATION OF WIRES. — An electric light company must properly insulate its wires where employees of a telephone company are liable to come in contact therewith. This duty does not extend to the entire system, but only to places where persons have a right to be, whether for business, convenience, or pleasure.
3. ELECTRIC LIGHT COMPANY — DUTY TO WARN TELEPHONE EMPLOYEES. — In the absence of an agreement or understanding that a signal would be given by an electric light company for the benefit and safety of telephone men, there was no duty to give such warning.

Appeal by plaintiff from judgment of Appellate Court, affirming judgment of trial court for defendant. *Affirmed.*

Duty of Electric Light Company to Insulate Wires. — See note to *Alexander v. Nanticoke Light Co., ante.*

Sharrock & Grundy and *Lane & Cooper,* for appellant.

Percy Werner (*J. E. Hogan,* of counsel), for appellee.

Opinion by CARTWRIGHT, J.:

Albert Rowe was employed by the Central Union Telephone Company in the city of Taylorville. On January 4, 1902, the appelee, the Taylorville Electric Company, owned and operated an electric light plant in said city, which had been in operation about eight years. The telephone company had secured a license to erect telephone poles, with wires, on the streets of said city, and on said day Rowe and five other employees of that company were at work stringing wires on poles in North street. The poles were set on the same side of the street as those of the electric company, but were higher. The poles of the electric company were twenty-five feet high and those of the telephone company thirty feet, so that the telephone wires would be about five feet above the electric wires. When the electric wires were not carrying any current of electricity, there was no danger in working above them, but when the current was turned on it was dangerous. They were calculated to carry a current of 1,000 volts, and 500 volts would be fatal to one coming in contact with them. In stringing the telephone wires one of them broke, and Rowe went down a pole and brought it up again. He was on the pole about twenty-five feet from the ground, stretching the wire, when it came in contact with the parallel electric light wire in which there was a current of electricity, and he received a shock causing him to fall from the pole upon the frozen ground. His hands were badly burned, his neck was broken, and he was dead when his companions reached him. His widow and administratrix, the appellant, sued the appellee in the Circuit Court of Christian county for damages resulting from his death. In the first count of her declaration she charged defendant with negligence in permitting its current of electricity to escape and be transmitted to the telephone wire which the deceased was handling. The second count charged defendant with negligence in turning on the current of electricity without giving a customary warning by a whistle from its engine. The third alleged that the defendant knew that the employees of the telephone company only did their work when the current was not turned on, and, notwithstanding this knowledge, neglected to

give warning of its intention to turn on the current. The fourth charged negligence in using imperfectly insulated wires. The fifth charged negligence generally in constructing, maintaining, managing, and operating the electric light plant. An additional count set forth that it was the custom of defendant to sound a whistle five minutes before turning on its current, and that the telephone employees relied upon such custom, and it charged negligence in turning on the current without warning. The plea was not guilty. At the conclusion of all the evidence the court, at the instance of the defendant, directed the jury to return a verdict of not guilty. A verdict was returned accordingly, upon which judgment was entered. Upon a writ of error from the Appellate Court for the Third District the judgment was affirmed. The Appellate Court granted a certificate of importance and an appeal to this court.

The question to be determined is whether the court erred in not submitting the issue to the jury and in directing a verdict of not guilty. That depends upon whether there was evidence fairly tending to prove a cause of action against the defendant. The evidence tended to prove the following facts: The defendant had operated its electric light plant in the city of Taylorville for eight years, and the wire at the place of the accident was secondhand when it was put up. The insulation of the wire was old and worn generally, and it was off and the wire was bare at a place called a "joint," where the accident occurred. The electric light current was not turned on at all times, but was turned on at different hours in different seasons and on clear or cloudy days. When it was dark and cloudy, it was kept on all day, and on clear days, at the time of year this accident occurred, it was turned on about 4 o'clock in the afternoon. The day of the accident was clear and bright. It had been the custom of the defendant to blow its whistle about five minutes before turning on the current, to notify its employees, so that if they were doing anything about the wires they would finish it and get away before the current was turned on. The accident occurred about fifteen minutes before 4 o'clock, according to the watch of one of the men, who looked at it at the time. The telephone men did not expect that the electric current would be turned on the wires until 4 o'clock, and they expected to get through before the current started. There was no signal

given before turning on the current on this occasion. Sometimes the telephone men would telephone the electric light plant or secretary and treasurer to learn what time the current would be turned on, but they also depended on hearing the whistle, and were governed as to the time to quit work by that signal. Rowe had been working for the telephone company about six months, and was experienced in the business. When the telephone men knew that the electric wires were carrying the current, they had means, by the exercise of extra care, of keeping the telephone wires off the electric wires, and they all understood the danger from having the wires come in contact with each other. It was known to the manager of the defendant that telephone wires were being put up in the streets, and about three-quarters of an hour before the accident the engineer of defendant passed near where the telephone men were at work, and in view of them; but there was no evidence that the defendant or any of its employees knew that the men were still at work at the time the current was turned on. The telephone men had no intention of continuing their work when the electric current was on the wires, and they were watching for the signal of the whistle, and also looking at their watches to learn the time of day. One of the gang of men had just looked at his watch, and put it back in his pocket, when the accident occurred. Rowe was supplied with a safety strap, by which to fasten himself to a pole when working with both hands, and he was not using it at the time of the accident.

It is contended that the uncontradicted evidence proved Rowe to have been guilty of negligence in not using the strap to fasten himself to the pole when using both hands with the wire. If he had used it, he would not have fallen, and his neck was broken by the fall of twenty-five feet upon the frozen ground; but there was evidence tending to prove that the electric shock was fatal. If the shock was sufficient to kill him, it was immaterial whether he fell or not. The court would not have been justified in directing a verdict on the ground that he was guilty of contributory negligence in not using the strap.

The other question is whether the evidence tended to prove actionable negligence on the part of the defendant, and the first question discussed by counsel is whether the condition of the electric wires, as to insulation, tended to prove such negligence.

Council for appellee say that the duty to maintain perfect insulation does not extend to the entire system of wires, but only to places where the defendant might reasonably anticipate that persons would go for work, pleasure, or business; that the duty did not extend to wires strung twenty-five feet above the ground simply because there was a possibility that some person in pursuit of his own business would bring himself in contact with a wire; and that there was no duty to keep wires in safe condition as to telephone employees entering upon the premises on their own business. Electricity is a silent, deadly, and instantaneous force, and one who uses it for profit is bound to exercise care corresponding to the danger incident to its use. One duty is the insulation of its wires, but that duty does not extend to the entire system. No duty of that kind is imposed on the owner on his own premises as to trespassers or bare licensees, who are neither invited upon the premises nor there for purposes of business with the owner. The defendant was not bound to assume that persons would come upon its private premises who were not invited there or brought there by business, and thereby expose themselves to injury. But the streets of the city were not the private premises of defendant. The streets belong to the public, and the public, generally, have a right to use them. As a matter of fact, the defendant must be held to have anticipated that the public would use the streets as they had a right to do, and also the employees of the telephone company would be working in the streets in the business of that company, and might come in proximity to its wires in attending to their duties. The defendant was not an insurer of the safety of the public, but it was bound to know the dangers incident to the use of the streets by it, and to guard against such dangers by the exercise of care commensurate with them.

Counsel rely upon the decision in *Hector v. Boston Electric Light Co.*, 5 Am. Electl. Cas. 300, 161 Mass. 558, 37 N. E. 773, 25 L. R. A. 554, as sustaining the doctrine contended for, but it clearly does not. We explained in *Commonwealth Electric Co. v. Melville*, 9 Am. Electl. Cas. —, 210 Ill. 70, 70 N. E. 1052, that in the case referred to the plaintiff received his injuries while on a roof of a building, where he had no right to be, and was neither invited nor licensed to be, and we decided that a company operating wires carrying a dangerous current of electricity owes a duty to

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give warning of its intention to turn on the current. The fourth charged negligence in using imperfectly insulated wires. The fifth charged negligence generally in constructing, maintaining, managing, and operating the electric light plant. An additional count set forth that it was the custom of defendant to sound a whistle five minutes before turning on its current, and that the telephone employees relied upon such custom, and it charged negligence in turning on the current without warning. The plea was not guilty. At the conclusion of all the evidence the court, at the instance of the defendant, directed the jury to return a verdict of not guilty. A verdict was returned accordingly, upon which judgment was entered. Upon a writ of error from the Appellate Court for the Third District the judgment was affirmed. The Appellate Court granted a certificate of importance and an appeal to this court.

The question to be determined is whether the court erred in not submitting the issue to the jury and in directing a verdict of not guilty. That depends upon whether there was evidence fairly tending to prove a cause of action against the defendant. The evidence tended to prove the following facts: The defendant had operated its electric light plant in the city of Taylorville for eight years, and the wire at the place of the accident was secondhand when it was put up. The insulation of the wire was old and worn generally, and it was off and the wire was bare at a place called a "joint," where the accident occurred. The electric light current was not turned on at all times, but was turned on at different hours in different seasons and on clear or cloudy days. When it was dark and cloudy, it was kept on all day, and on clear days, at the time of year this accident occurred, it was turned on about 4 o'clock in the afternoon. The day of the accident was clear and bright. It had been the custom of the defendant to blow its whistle about five minutes before turning on the current, to notify its employees, so that if they were doing anything about the wires they would finish it and get away before the current was turned on. The accident occurred about fifteen minutes before 4 o'clock, according to the watch of one of the men, who looked at it at the time. The telephone men did not expect that the electric current would be turned on the wires until 4 o'clock, and they expected to get through before the current started. There was no signal

given before turning on the current on this occasion. Sometimes the telephone men would telephone the electric light plant or secretary and treasurer to learn what time the current would be turned on, but they also depended on hearing the whistle, and were governed as to the time to quit work by that signal. Rowe had been working for the telephone company about six months, and was experienced in the business. When the telephone men knew that the electric wires were carrying the current, they had means, by the exercise of extra care, of keeping the telephone wires off the electric wires, and they all understood the danger from having the wires come in contact with each other. It was known to the manager of the defendant that telephone wires were being put up in the streets, and about three-quarters of an hour before the accident the engineer of defendant passed near where the telephone men were at work, and in view of them; but there was no evidence that the defendant or any of its employees knew that the men were still at work at the time the current was turned on. The telephone men had no intention of continuing their work when the electric current was on the wires, and they were watching for the signal of the whistle, and also looking at their watches to learn the time of day. One of the gang of men had just looked at his watch, and put it back in his pocket, when the accident occurred. Rowe was supplied with a safety strap, by which to fasten himself to a pole when working with both hands, and he was not using it at the time of the accident.

It is contended that the uncontradicted evidence proved Rowe to have been guilty of negligence in not using the strap to fasten himself to the pole when using both hands with the wire. If he had used it, he would not have fallen, and his neck was broken by the fall of twenty-five feet upon the frozen ground; but there was evidence tending to prove that the electric shock was fatal. If the shock was sufficient to kill him, it was immaterial whether he fell or not. The court would not have been justified in directing a verdict on the ground that he was guilty of contributory negligence in not using the strap.

The other question is whether the evidence tended to prove actionable negligence on the part of the defendant, and the first question discussed by counsel is whether the condition of the electric wires, as to insulation, tended to prove such negligence.

Council for appellee say that the duty to maintain perfect insulation does not extend to the entire system of wires, but only to places where the defendant might reasonably anticipate that persons would go for work, pleasure, or business; that the duty did not extend to wires strung twenty-five feet above the ground simply because there was a possibility that some person in pursuit of his own business would bring himself in contact with a wire; and that there was no duty to keep wires in safe condition as to telephone employees entering upon the premises on their own business. Electricity is a silent, deadly, and instantaneous force, and one who uses it for profit is bound to exercise care corresponding to the danger incident to its use. One duty is the insulation of its wires, but that duty does not extend to the entire system. No duty of that kind is imposed on the owner on his own premises as to trespassers or bare licensees, who are neither invited upon the premises nor there for purposes of business with the owner. The defendant was not bound to assume that persons would come upon its private premises who were not invited there or brought there by business, and thereby expose themselves to injury. But the streets of the city were not the private premises of defendant. The streets belong to the public, and the public, generally, have a right to use them. As a matter of fact, the defendant must be held to have anticipated that the public would use the streets as they had a right to do, and also the employees of the telephone company would be working in the streets in the business of that company, and might come in proximity to its wires in attending to their duties. The defendant was not an insurer of the safety of the public, but it was bound to know the dangers incident to the use of the streets by it, and to guard against such dangers by the exercise of care commensurate with them.

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exercise reasonable care to prevent injury to others, wherever they have a right to go. The duty extends to every place where persons have a right to be, whether for business, convenience, or pleasure. The condition of the electric wire as to insulation tended to prove negligence on the part of the defendant, which would give rise to a cause of action for an injury to one not aware of the danger, who had a right to rely upon the wire being properly insulated. The evidence, however, was that the telephone men were familiar with the danger, and had no intention of working when the electric current was on the wires. The evidence was uncontradicted that they were not relying upon the performance of any duty to insulate the wires, and fully knew and understood the dangers arising from the defective insulation. If they knew that the electric wire was carrying a deadly current, and Rowe, with full knowledge of the conditions and dangers, allowed the telephone wire to come in contact with the electric wire, there could be no recovery on the ground that the insulation was defective. It was only on account of his ignorance of the current having been turned on that the accident occurred.

The only question, therefore, is whether the failure of the defendant to blow the whistle before turning on the current rendered it liable in the case. The signal which the defendant was in the habit of giving by blowing the whistle was for the benefit of its own employees, so that, if they were at work about the wires, they would hurry, and get through before the current was turned on. There was no evidence tending to prove any agreement between the companies with respect to giving signals, or any knowledge on the part of the defendant that the telephone men were relying upon them. Neither was there any evidence of notice to the defendant that the telephone men were at work at that time. If there was a duty of the defendant to give a warning, it was one which extended to everybody, and required the blowing of the whistle to give general notice that it was about to start up the plant. It would not be contended that there was such a duty as that, or that the defendant would be guilty of negligence in failing to give such notice to the public at large. The telephone men did not expect the plant to start until 4 o'clock, and they were calculating to finish their work before that time, although they also expected to hear the whistle before the current was turned on.

In the absence of any proof tending to show an agreement or understanding that the signal would be given for the benefit and safety of the telephone men, or that the defendant knew they were relying upon the whistle as a warning, we do not think there was a duty to give the warning. If there was no duty, the telephone men had no legal right to rely upon notice by the whistle, and a failure to give it did not charge the defendant with negligence. If follows that the court did not err in giving the instruction. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

E. E. SOUTHER IRON CO. v. LACLEDE POWER CO. OF ST. LOUIS.

Missouri — St. Louis Court of Appeals — Dec. 27, 1904.

109 Mo. App. 353, 84 S. W. 450.

CONTRACT FOR ELECTRIC POWER — CONSTRUCTION. — Where an impracticable or impossible means of ascertaining electrical power is designated in a contract therefor, some practicable and efficient means should be used to measure the power actually used, and thus carry out the real intention of the parties.

Appeal by defendant from a judgment for plaintiff. *Affirmed.*

Statement of facts by BLAND, P. J.:

Both parties to this suit are corporations organized under the laws of Missouri, and both operate their plants in the city of St. Louis. Plaintiff is engaged in the manufacturing business, for which purpose it uses machinery. Defendant is engaged in supplying electric power. On August 1, 1898, plaintiff and defendant entered into a contract whereby defendant agreed to furnish plaintiff electric power for the operation of its machinery "for periods of three years until either party shall, at the expiration of any period of three years, give written notice of its desire to discontinue this arrangement." It was agreed that defendant should take a capacity of 18-electric horse power, and, if a greater power capacity should be taken at any time, an additional price should be paid therefor on the following basis: "Minimum charges per month under this contract are at the rate of two dollars net per horse power, and are based upon the maximum power capacity required or used at any time, but in no case shall the total payments during each year of the period or periods of this contract be less than four hundred and twelve dollars." Meters were to be furnished at the option of the consumer or the power company. The rate stipulated for was three cents net per horse power per hour, indicated by an hour meter, subject to the minimum charge of four hundred and twelve dollars per annum. It was agreed that bills for the use

of power should be rendered on the 1st day of each month, payable on or before the 5th day of the same month, and, if unpaid after five days, they should be subject to an additional charge of five per cent., and, if unpaid for fifteen days, the supply of power might be shut off by the power company. About the date of the contract the power company put wires into plaintiff's place of business, and continued to furnish it power until April 30, 1901. On the presentation of the bill for the first month's services, a controversy arose between the parties in respect to the construction of the contract, and they agreed in writing to submit the matter in controversy to Hon. Shepard Barclay and Hon. O'Neill Ryan; they to choose a third arbitrator if they failed to agree. The questions which they agreed should be submitted are as follows:

"(1) Whether or not the method now in use by the power company at the iron company's establishment for ascertaining the amount payable for the electric power service or supply is the correct method under said contract, and, if not, then what is the correct method under said contract?

"(2) If the arbitrators find that the method in use is not the correct method under said contract, then whether or not said iron company may, under said contract, lawfully require the said power company, under the conditions of said contract, to place meters at other points in said establishment than at the four motors where the power company's meters are now located."

It was agreed in the written submission that the findings of the arbitrators might be entered as a judgment by the Circuit Court of the city of St. Louis. The arbitrators chosen failed to agree, and selected John Holmes, Esq., as a third arbitrator. The matter was pending before the arbitrators until March 24, 1900, when they published their award. They found as follows: "The correct method for ascertaining said amount is for said power company to ascertain, charge for, and receive payment from said iron company for only such amount of electrical power furnished to said iron company under said contract as is actually used by the said iron company (provided, however, said iron company must pay in the aggregate at least the sum of four hundred and twelve dollars [$412] during each year of said contract), and such electrical power so used by said iron company is to be measured by hour meters placed at or upon such motors as are now or may hereafter be in use by said iron company in its said establishment; and, in addition thereto the said power company shall place or cause to be placed an hour meter at or on such particular machines (including moters or other machines) in said establishment of said iron company as may be designated from time to time by said iron company (while said contract remains in force); said iron company making a deposit for such motor so required, to cover the cost, as provided in said contract." The award was taken into the Circuit Court by the iron company, and on its motion a decree was rendered confirming the award, to which defendant objected at the time, but from which no appeal was taken, or writ of error prosecuted.

There were four motors in plaintiff's plant, to each of which defendant attached a wire and an hour meter when it first began to furnish power. After the confirmation of the award of the arbitrators, there was some correspondence between the parties in reference to putting in additional meters, but nothing definite was ever agreed upon, and no additional meters were put in. Pending the arbitration the parties agreed in writing that the defendant

should pay the power company monthly bills as rendered, but that such payment should be regarded as involuntary, and not to be taken as concessions of indebtedness, and that they should be without prejudice to the iron company for reimbursement for so much of said payments as might be found to be in excess of what might be justly due the power company under the contract as ultimately construed by the arbitrators. The payments made by the iron company to the power company aggregated $2,370.09, exclusive of the power furnished for the months of February, March, and April, 1901. The power company rendered bills for each of these three months, but payment was refused by the iron company. Its refusal to pay these bills caused the power company to sever its wires from the iron company's plant, and the latter company gave notice of its intention to terminate the contract at the expiration of the first three-year period (August 1, 1901). At the time the contract was terminated the iron company claimed that it had overpaid the power company the sum of $1,134.09 for the electric power furnished by the latter company for the entire thirty months. This suit was brought to recover this alleged overpayment.

The answer, in addition to putting in issue all the material allegations of the petition, alleged two counterclaims as a cause of action against the iron company — one for the contract price of the electric power furnished for the months of February, March, and April, 1901; another sounding in damages for breach of contract. These affirmative defenses were put in issue by a reply. The reply also alleged that the iron company had given written notice that it would not renew the contract after the expiration of the first three-year period, August 1, 1901. The issues were submitted to the court without the intervention of a jury, who found for plaintiff in the sum of $1,134.09, with interest at the rate of six per cent. per annum from January 16, 1903, the date of the commencement of the suit. After unavailing motions for new trial and in arrest of judgment, defendant appealed.

C. R. Skinker, for appellant.

Hickman P. Rodgers, for respondent.

Opinion by BLAND, P. J.:

1. In its motion for new trial the appellant assigns as one ground therefor that the petition failed to state facts sufficient to constitute a cause of action, and insists that the motion should have been sustained on that ground. The petition is somewhat voluminous, covering four printed pages of appellant's abstract. It sets forth the making of the contract, the dispute as to its construction, the submission to arbitration of the disputed matter, the award of the arbitrators, the judgment confirming the award, the payment of monthly bills for electric power under the arrangement entered into between the parties pending the submission to the arbitrators, and alleges an overpayment, and asks judgment

therefor. It seems to us that this is sufficient, especially after verdict.

2. Appellant objected to the award and the decree thereon as evidence, on the ground, first, that the award and the decree were impossible of performance; and, second, that the arbitrators exceeded the power delegated to them by the written articles of submission. The contention is that hour meters measure time, only, and not power, and the arbitrators exceeded their authority in finding that appellant was entitled to $412 per annum, under the terms of the contract, when this question was not submitted to them. The award, when considered in the light of the contract, shows that the reference therein to the $412 is only a parenthetical quotation from the contract itself, and is made as a matter of precaution to prevent the possibility of either party being misled by the language of the award, and really constitutes no part of the findings of the arbitrators. In respect to the objection that the award and decree is impossible of performance, it is shown by both parties that hour meters do not measure the power, but only measure the time machines to which they are attached are operated; and it is also shown that, without the aid of some other device, it is impossible to arrive at the quantity of power employed to operate a machine by electricity, when nothing more than the time it was in operation is shown, from which to make the calculation. But this fact does not appear on the face of the decree confirming the award, and, even if it did, we do not think it would show that the judgment is absolutely void. The award and decree construing the contract are conclusive on both parties, and were admissible for the purpose of showing what the contract is. The application of that construction of the contract to conditions that arose under it is quite another thing.

3. The evidence shows that each of the four motors of respondent's plant supplied power for the operation of a half dozen or more different machines, and that all the machines supplied with power from any one motor were scarcely ever in operation at one and the same time. Frequently one, two, or three of such machines, and sometimes but one, would be running. It appears from the evidence produced by the appellant that the basis of calculation for its bills were on the horse power, multiplied by the hours used. Witness Elwood V. Matlack said that the hour meter only regis-

tered the hours during which the current was used; that the hour meter could not indicate whether the power generated by the motor was actually used or not; that the appellant's bills took into account the amount of power actually used, determined by an ammeter operating at the same time the hour meters were in operation, and that the bills were made upon the basis of the power required to operate the motors, shafting, and machines attached; that his (witness') conception of what "horse power" means, under the contract, "is a maximum rate for use of power; and that 'per horse power' means that the maximum rate for use of power, multiplied by the total number of hours shown by the hour meter, would be the amount upon which the bill would be figured at the contract rate of three cents" per horse power per hour. This evidence shows that by ammeter measurement the appellant ascertained the maximum amount of power generated by the motors in respondent's plant, and by the hour meters attached to each motor it calculated the number of hours each one was in operation, and on this basis made out its bills; that is, the calculation was based on the maximum power generated by each motor, multiplied by the number of hours it had been run, as indicated by the hour meter, irrespective of the number of machines that were supplied with power by the motor. So it reasonably appears that the respondent was charged for maximum power generated by a motor, whether that motor furnished power to one, two, or a half dozen machines depending on it for power. It was against this method of calculating the power furnished or claimed to be furnished that respondent protested, and which resulted in the submission of the contract to arbitrators for construction. Appellant insists that this method of calculating the power is the one provided for by the contract, and that there is no evidence that its calculations or bills are erroneous. The contract, as construed by the decree confirming the award, which is not only binding upon both parties, but also upon us, is that respondent should be charged for only such amount of electric power furnished and actually used by it; the quantity of the power to be measured by hour meters placed on the motors, and, in addition thereto, upon such particular machines as might be designated from time to time by respondent. This construction, according to the evidence, placed the parties in this dilemma: The appellant could charge

for only the power actually used by the respondent; the quantity of this power to be measured by hour meters — an instrument or device by which electric power cannot be measured. In other words, the appellant was required to make out its bills for power actually used, and a device was designated for measuring this power that would not measure it. For these reasons, appellant claims that its method of calculating the power is the only one permissible under the contract, and, according to the decree, no other instrument can be used for measuring the power; yet, in the face of this contention, its evidence shows that it was compelled to use and did use an ammeter (not mentioned at all in the contract) for the purpose of ascertaining the maximum power generated by the four motors in appellant's plant. The gist of the matter in controversy, when submitted for arbitration, was, for what should respondent pay — the maximum power generated by the four motors in its plant, or for the actual amount of power used for operating its machines? The decree is that it shall pay for the latter amount only. Now, because an impracticable or impossible means of ascertaining that power is designated in the contract, and also by the arbitrators, is the amount of power furnished to be left to the guess of the appellant, or should not some practicable and efficient means be used for the purpose of measuring the power actually used, and thus carry out the real intention of the parties, as construed by the decree of the court? If not, then the contract is not capable of execution at all, and the respondent is liable only for the price of the power actually fur-

Company for twenty months preceding the trial, and that the average horse-power hours per month was 1,008.9, while the average horse-power hours per month for the thirty months appellant furnished power was, according to its bills and measurements, 2,658, and yet the evidence shows that respondent used on an average more power per month while taking from the Laclede Gaslight Company than when taking power from the appellant. The power taken from the Laclede Gaslight Company was measured by watt meters attached to the machines — appliances which the evidence shows measure both time and the amount and power of the current passing through the meter. All this evidence was objected to by appellant on the ground that, the parties having fixed the mode of measuring the power by the contract, no other mode could be resorted to. It is well-settled law that, where a mode of measurement for ascertaining an amount to be paid on a contract is specified in the contract, that mode, and no other, must be followed. *United States v. Robeson,* 9 Pet. 319, 9 L. Ed. 142; *Herrick v. Belknap, etc.,* 27 Vt. 673; *Hood v. Hartshorn,* 100 Mass. 117, 1 Am. Rep. 89; *President, etc., v. Coal Company,* 50 N. Y. 250; *Laclede Construction Co. v. Tudor Ironworks,* 169 Mo. 137, 69 S. W. 384. But the appellant proved that the method provided by the contract for measuring the power was an impossible one, and it could not be measured at all by the meter mentioned in the contract; hence it follows that the contract, while it undertook to provide a method, in fact provided none. In these circumstances, what should be done to ascertain the amount the respondent should pay — try to apply an arbitrary but impossible method of measurement, or take the best evidence obtainable to show the actual amount of power used? The latter course was approved by the learned trial court, and it seems to us that it was not only the proper course, but the only one, by which the amount of power furnished by appellant could have been ascertained. The situation was not unlike one where a contract for work provides for payment to be made on the estimate of a particular engineer or architect, and the engineer or architect dies before making the estimate, or refuses to make one after the work has been done, or acts fraudulently. In such circumstances the party doing the work may recover on a *quantum meruit* not exceeding the contract price. *Williams v. Railway,* 112 Mo. 463,

20 S. W. 631, 34 Am. St. Rep. 403; *Nordyke & Marmon Co. v. Kehlor,* 155 Mo. 643, 56 S. W. 287, 78 Am. St. Rep. 600; *Herrick v. Belknap, supra.*

5. It is contended by appellant that respondent is not entitled to recover for the reason that it failed to perform its part of the contract, by refusing to pay the bills for the months of February, March, and April. There are two answers to this contention, either of which is sufficient: One is that, according to the evidence and the finding of the court, each of these bills was for a sum in excess of what was actually due. The other is that, at the time these bills were presented, the appellant, according to the evidence and the finding of the court, owed the respondent a sum of money exceeding the aggregate amount of those bills.

6. Declarations of law were given, and some asked by defendant were refused. Error on this score is assigned. Either party had a right to ask declarations of law, though the issues were submitted to the court, and they are reviewable here. They serve to show on what theory of law the court decided the case, and, if they show that the court adopted the wrong theory and came to a wrong conclusion, the judgment should be reversed. *Butler Co. v. Boatmen's Bank,* 143 Mo. 13, 44 S. W. 1047; *Wheeler v. McDonald & Co.,* 77 Mo. App. 213. The declarations of law given are in harmony with the views herein expressed. Those refused are to the contrary, and we conclude that the court committed no error in giving or refusing the declarations of law.

There are a number of other assignments of error found in the appellant's brief, but, as those examined and passed on cover the entire controversy, we deem it unnecessary to extend this opinion to a discussion of assignments of error that do not affect the merits of the cause.

We think the judgment is for the right party, and it is affirmed. All concur.

ANDERSON v. SEATTLE-TACOMA INTERURBAN RAILWAY CO.

Washington Supreme Court — Dec. 28, 1904.

3 St. Ry. Rep. 894, 30 Wash. 387, 78 Pac. 1013.

PEDESTRIAN ON TRACK OF RAILWAY COMPANY, WHEN NOT A TRESPASSER — LIABILITY FOR INJURIES FROM CONTACT WITH RAIL CHARGED WITH ELECTRICITY. — A person who purchases a round-trip ticket over a railway between two points, and who, on the return trip, is refused admission to a car operated by the street railway company, who is not directed by the company's employees as to the manner in which he might leave the company's property, is not a trespasser in walking upon the tracks of the company, but is entitled to reasonable protection from the hidden or unknown danger arising from the fact that one of the rails forming the track was charged with electricity. The question of the company's negligence in failing to warn him of the danger of coming in contact with an electrically charged rail, while walking on the track, after he had been wrongfully forced to leave a car at a station, is a question of fact for the jury, as is also the question of the negligence of such person, in the absence of knowledge of the existence of the danger from contact with such rail, in walking upon such track.

Appeal by the plaintiff from a judgment dismissing his complaint. *Reversed.*

James M. Epler, for appellant.

Piles, Donworth & Howe, for respondent.

Opinion by HADLEY, J.:

This is an action to recover damages for personal injuries received by the appellant, and alleged to have been caused by the negligence of the respondent. The respondent is the owner and operator of an electric railroad between the cities of Seattle and Tacoma. The appellant's complaint alleges that on the 5th day of October, 1902, he was a passenger on a car of the respondent going from Tacoma to Seattle, and was riding on a ticket purchased by him at Seattle from an agent of respondent, which ticket entitled him to ride on respondent's cars from Seattle to Tacoma and return; that he was on a car of respondent, riding on said ticket, when the car reached a point about four miles from Tacoma, in the direction of Seattle; that the cars were stopped

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Injuries from Contact with Rail Charged with Electricity. — See note to *Keeley v. Boston Elevated Ry. Co., post.*

at said point, and one of the men in charge — either the motorman or conductor — twice requested appellant, in a manner amounting to a command, to get off the car; that he did get off and the car at once started, leaving appellant standing beside the track at a station, the name of which is unknown to him; that, upon being forced to get off the car, he at once started back toward Tacoma, and walked on the ties of the railroad bed; that he had proceeded about a mile to a point where the roadbed is upon an embankment elevated some five or six feet, the embankment being quite steep, at which place he saw a bridge a short distance ahead; that for fear of some accident he tried to get off the roadbed and down the embankment, and in his efforts to descend he reached his hand and took hold of one of the rails placed and used by respondent on its track, when he received a terrible electric shock; that the shock was so severe that it rendered him unconscious, threw him prostrate upon the ground, where he lay in an insensible condition for three-quarters of an hour, and on recovering consciousness he found he could not use his left hand, arm, or leg, they seemed to be paralyzed; that he was injured about 6:30 P. M., and after recovering consciousness he dragged himself along by the aid of his uninjured leg until he reached a hotel in Tacoma, about 1 o'clock A. M.; that respondent company had left said rail so charged with electricity in an exposed position with no covering over it, and with nothing to protect any one who should touch it from receiving the full force of the electric charge borne by the rail; that in so doing respondent was guilty of negligence, and that by reason of such negligence appellant was injured without fault on his part. The nature and continuing effect of the injuries are also set forth in detail. The answer is a general denial of the material averments of the complaint, and it also affirmatively alleges contributory negligence. A trial was had before the court and a jury. At the conclusion of the plaintiff's evidence the respondent challenged the sufficiency of the evidence to sustain a verdict in behalf of plaintiff, and moved the court to take the case from the jury, and enter judgment in favor of the defendant, as provided by statute. The motion was granted by the court, and judgment was entered dismissing the action at plaintiff's costs. The plaintiff has appealed.

The evidence shows that appellant had bought a round-trip

ticket of passage over respondent's road from Seattle to Tacoma and return. He had made the trip from Seattle to Tacoma in the afternoon of the day the accident happened. After spending some time in Tacoma, and at about 6 o'clock in the evening, he attempted to get upon one of respondent's cars for the return trip to Seattle. The car was then on Pacific avenue in Tacoma. He approached it from the left side, and just as it was starting he stepped upon the front step. The front door upon that side was closed, and appellant says he thought they were going to open it and let him in, but they did not do so. There is evidence to the effect that, when these cars were afterward flagged across the Northern Pacific railroad tracks in Tacoma, the appellant had sufficient time to go around the car and get into it from the other side. But it also appears from the evidence that he did step off at said place, and that the car started against almost immediately, when he stepped back where he had been standing. Whether there was sufficient time for appellant to have gone around the car and entered it from the right side or not, he in any event did not do so, and remained upon the left front step until the car reached the first station out of Tacoma. Upon reaching this station, the motorman opened the door and told appellant he must get off the car. Appellant stepped with one foot onto the station platform, and the car immediately started. He then jumped back upon the car step, and the car was again stopped, when he was forced to get off. When he was told he must get off, he said: "I have got a ticket to go to Seattle. Give me time to get around on the other side and get on the car." But no time was given, and the car immediately moved away. Being thus left, and believing that his business required his return home that night, appellant immediately started back toward Tacoma for the purpose of trying to get a boat for Seattle. By this time darkness had come on, and appellant, being a stranger to the surroundings and unacquainted with the topography and highways of the locality, started to walk upon the railroad track, with the result stated in his complaint.

The trial court, when ruling upon the motion for nonsuit, stated, as shown by the record:

"I do not think there is any doubt but what the evidence shows that the defendant neglected its duty to the plaintiff, in not either permitting him to

go in the car from the front door, where he was hanging on the outside, or giving him sufficient time to get around to the other side of the train, where he could get in where it was open."

The court further stated that he believed appellant would have a cause of action against respondent for wrongfully leaving him at the station, but that he was guilty of negligence when he started to walk on the railroad track, and is not entitled to recover for his injuries. The appellant, however, bases his right to recover upon the theory that respondent negligently put him off the car on the right of way when that right of way was in an unsafe condition, and without giving him any notice or warning of the danger. He testified that he did not know of the existence of the electrically charged rail, and there is no evidence to the contrary. This accident occurred on the first Sunday after the road was opened for travel. There is evidence that the newspapers had mentioned the matter of this third rail, but it does not appear that appellant knew about it. The evidence shows that neither the motorman nor the conductor nor any one else notified him or warned him of the danger when he was put off the car. It must, therefore, be assumed, for the purposes of this discussion, that he was in absolute ignorance of the presence of danger from such a source. It appears that a notice was posted at the station calling attention to this dangerous rail, but in the darkness appellant did not see it, and knew nothing of it. There were some electric lights at the station, but he did not see the notice, and started to walk upon the track in entire ignorance of the presence of any danger not ordinarily to be expected when walking upon a railway track. The respondent claims that, having fenced his right of way and posted the notices as to danger, it thereby discharged its duty in the way of securing the public, and was entitled to use upon its own premises such devices as it chose to operate. It is, therefore, claimed that appellant was a trespasser upon respondent's premises at the time he was injured, and for that reason cannot recover.

It cannot be said that appellant's presence upon respondent's premises was initiated by trespass. He had by contract and for a consideration first entered upon the premises, and had been carried as a passenger from Seattle to Tacoma. The same contract called for his transportation from Tacoma to Seattle, and he, therefore, not only had a right to be upon the premises, but was there

by the invitation and consent of respondent. The conduct of respondent's agents and employees in forcing him to leave the car is unexplainable in the light of the evidence in the record. Certainly the demand for speed in modern travel does not call for such zeal on the part of the employees of a railway company that time shall not be given a passenger to get aboard when he has already paid his money in the usual manner for his transportation. The fact remains in this instance, however, as appears from the record, that just that thing occurred, and appellant was forced to step from the car upon respondent's right of way. He was, therefore, not a trespasser *ab initio,* and certainly not one up to the time he was left in the night-time at a strange place upon respondent's premises. Being thus left upon the premises where he had a right to be, did he thereafter become a trespasser? It is true he was left at a station surrounded by farm houses, but that was only a part of the premises to which he had been invited by respondent when it accepted his money and agreed to carry him as a passenger. He had the right to pass over the entire right of way in respondent's cars, but that right had been denied him. When he was left by respondent he was not directed to leave its premises, but was merely forced from its cars and deposited upon its right of way. He was not informed how in the night-time he could find his way over the ordinary highways. Being thus left upon the premises, under all these circumstances, did he have no rights greater than those of an ordinary trespasser when he moved along respondent's track? It is true he was not invited upon the premises as a pedestrian, but he was invited to come for business purposes, and we believe, under all the conditions, that he did not become a trespasser in the really tortious sense of that term, even though some elements of technical trespass may have been present. He was in any event entitled to the reasonable protection from injury which one human being owes to another when placed in like situation. Respondent's agents must have known that from common experience the thing appellant was most apt to do was to take the track back to Tacoma. They should, therefore, have seen that he was advised of the danger of such a course because of the unusual and imperceivable danger to an uninformed traveler. Doubtless he was required to take the risk of all ordinary dangers attending a pedestrian upon

a railway track, such as contact with moving trains, falling through bridges, and other usual dangers. But since he came upon respondent's premises rightfully, and did not come as a wilful trespasser, we think he was not required to take the risk of such an unusual and hidden danger as this third rail. Its character was unknown to him, and its powerful, death-dealing force was entirely concealed.

"The great force that was being carried over the wires gave no evidence of its existence. There was no means for a man of ordinary education to distinguish whether the wire was dead or alive. It had all the appearance of having been properly insulated. From this fact there was an invitation or inducement held out to Clements to risk the consequences of contact." *Clements v. Light Co.* (La.), 11 South. 51, 52, 16 L. R. A. 43, 32 Am. St. Rep. 348.

In the case at bar, however, the dangerous agency was not a wire which, when strung upon insulators, may ordinarily be supposed to be charged with electricity, but it was a common rail bearing only the appearance of an ordinary rail of a railway track, and disclosing no connective relations which would render it more dangerous than an ordinary piece of iron. If modern transportation methods involve the use of such concealed, unprotected, dangerous, and deadly devices in places where persons of common experience may be expected to come in contact with them, we believe those who use them should not escape liability unless they exercise such a degree of care to warn and protect those who are injured as the circumstances and surroundings reasonably require. Whether such care is exercised in a given case becomes a question of fact for the jury. In a case of this kind the conditions are out of the ordinary, and call for care commensurate therewith. To the uninformed the danger in this rail was as completely hidden as is the danger in the case of a spring gun. It is true spring guns are usually set for the express purpose of inflicting injury or taking life, while this rail was placed without such intention, but to be applied to the useful purposes of commerce and transportation. To one ignorant of the presence of the danger, however, injury follows alike as the result of coming in contact with either device. This court has held that death to an absolute trespasser from the discharge of a spring gun, not set to kill any particular person, makes the one who sets it guilty of murder in the second degree. *State v. Barr,* 11 Wash. 481, 39 Pac. 1080, 29 L. R. A. 154, 48 Am. St. Rep. 890. While the

absence of criminal intent may remove this case from the domain of crime, yet resultant damage from neglect to sufficiently guard and warn against what is in itself an entirely concealed death trap is in effect the same as that visited by the spring gun, and is certainly ground for recovery of damages. Whether such neglect exists in this case is for the jury to say, and the same is also true as to whether appellant was guilty of contributory negligence.

The general principle applying to those who go upon premises of another by invitation or inducement for business purposes is well expressed in *Carleton v. Franconia Iron & Steel Co.,* 99 Mass. 216, as follows:

> "The owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the land or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist and has given them no notice of."

The above statement of principle exactly covers the relations of respondent and appellant at the time and place the latter was put off the car. If he had at that place come in contact with this hidden danger, the stated principle would have completely covered this case, without leaving room for argument. The concealed danger was not, however, at that immediate point, but first appeared just outside the station grounds, a few feet away. Unless a radical change of relationship occurred the moment appellant crossed the line between the station grounds and the unprotected third rail, then it did not occur at all. For reasons already stated, we think, as he was not a trespasser in the beginning, he did not become a real trespasser at all, but was on respondent's premises by inducement for business purposes, and, being left as he was under the peculiar circumstances, he was not required to measure with exactness any given number of square feet of respondent's right of way which he might occupy, and at the same time feel secure from hidden and unusual dangers, unless he had been warned of the danger. We, therefore, think the authority quoted is applicable to appellant's situation at the time he was injured. The same principle is sustained in the following cases: *Bennett v. Railroad Co.,* 102 U. S. 577, 26 L. Ed. 235; *Nickerson v. Tirrell,* 127 Mass. 236; *Davis v. Central Congregational Society,* 129 Mass. 367, 37 Am. Rep. 368; *Beck v. Carter,* 68 N. Y. 283, 23

Am. Rep. 175; *Camp v. Wood,* 76 N. Y. 92, 32 Am. Rep. 282; *Hayward v. Merrill,* 94 Ill. 349, 34 Am. Rep. 229; *Hartwig v. C. N. W. Ry. Co.,* 49 Wis. 358, 5 N. W. 865.

Respondent cites a number of cases where the relationship in the beginning was that of trespasser, and continued until the time of the injury. Such, as we have seen, was not true here. In *Ham v. President, etc.* (Pa.), 26 Atl. 757, 20 L. R. A. 682, cited by respondent, a passenger was wrongfully ejected from a train, and was afterward killed while walking upon the track. The standard set in that case was that the deceased should have left the track "at the earliest practicable opportunity that a reasonably prudent man would have discovered and seized, and that the plaintiff had the burden of proof that he did so." The question was left to the jury. The same case is also cited by respondent as reported in 21 Atl. 1012, in which the court uses the language that nothing short of "imperious necessity" would have excused the deceased in continuing on the track, but the opinion on the second appeal clearly established the rule above stated as to prudence and care, and left it for the jury to decide the fact in that regard. *Benson v. Central Pac. R. Co.* (Cal.), 32 Pac. 809, also cited by respondent, was a case where a six-year-old child was carried with her father beyond her station. She and the father walked back upon the railroad track, and the child was struck by a train. Recovery was denied. The accident happened in broad daylight, and, as we have already intimated, one walking upon a railway track under such circumstances, although not a trespasser from the beginning, must, in the absence of wanton negligence on the part of the railway company, take the risk of such ordinary dangers as the running of trains, but that a different rule should apply where a concealed deadly agency is strung continuously along the track, and of which the pedestrian has received no notice. *Webster v. Fitchburg R. Co.* (Mass.), 37 N. E. 165, 24 L. R. A. 521, was a case where a person in possession of a ticket, while running across the company's tracks outside the passenger station, apparently to catch a train about to start, was struck and killed by another train. Recovery was denied on the theory that he had not yet become a passenger. In any event, whether he was such or not, he was required to look out for such known dangers as running trains when he was upon the tracks.

The facts of other cases cited by respondents, we believe, do not bear sufficient analogy to the facts of this case to make a discussion of them profitable here. For these reasons, we think the questions of negligence and contributory negligence, under the evidence as introduced, were for the jury under proper instructions. We, therefore, think the court erred in withdrawing the case from the jury.

The judgment is reversed, and the cause remanded with instructions to proceed with a new trial.

FULLERTON, C. J., and DUNBAR and ANDERS, JJ., concur.

OTHER 1904 CASES NOT REPORTED IN FULL.

1. **Injury to Passengers. (1-2.)**
2. **Injury from Contact with Broken Telephone Wire. (3.)**
3. **Injury from Contact with Ends of Spliced Wires. (4.)**
4. **Death from Shock While Rescuing Co-employee. (5.)**
5. **Death from Lightning Entering Building over Telephone Wires. (6.)**
6. **Incorporation and Establishment of Electric Light Plant by Municipality. (7-8.)**

1. Passenger Injured by Explosion of Fuse — Sufficiency of Complaint — Res Ipsa Loquitur — Burden of Proof. — In the case of *Williams v. New York & Queens County Ry. Co.*, 97 App. Div. 133, 89 N. Y. Supp. 659, the plaintiff in her complaint alleged that while a passenger upon one of the defendant's electric cars, owing to the careless and negligent management of the car by the defendant, in putting on too heavy a current or voltage of electricity, a defective fuse exploded with a loud report, setting free a heavy current of electricity, whereby the car was set on fire, and a large flame of fire and cloud of smoke giving forth flames of burning material, involved said car; that by reason thereof the passengers became terrified and the plaintiff, thinking herself in peril, tried to escape, but was forced to the street by the violence of the crowd and was injured. The plaintiff on the trial gave evidence tending to show that a fuse, used in connection with the electrical appliance of the company, blew out, and that a blaze enveloped the front of the car. The plaintiff also attempted to prove that the accident was the result of careless and negligent management of the car, but was unsuccessful in such attempt. It was held that the facts proved by the plaintiff were sufficient to throw the burden of explaining the cause of the accident upon the defendant, and that it was error for the court to refuse to allow the plaintiff to amend her complaint so as to allow the question of the defendant's negligence to be submitted to the jury upon the principle of *res ipsa loquitur*. Such an amendment would not have been to the prejudice of the defendant, as from the nature of the case the defendant must have had as complete knowledge of the cause of the accident as the plaintiff herself. A judgment for the defendant was reversed and a new trial granted.

2. Passenger Injured in Disturbance and Confusion Resulting from Breaking of Span Wire Attached to Trolley Wire — Involun-

tarily Jumping from Car. — In the case of *Stern v. Westchester Elec. R. Co.*, 99 App. Div. 491, 90 N. Y. Supp. 870, the plaintiff sought to recover damages for personal injuries received while a passenger on one of the defendant's cars. It appeared that the car was an open trolley car and that the span wire holding the trolley wire broke from some unexplained cause while the car was going very fast, and the trolley pole and wire fell upon the car, and in the flashing of electric light and the unusual commotion which ensued, the plaintiff was either thrown or jumped in fright from the car. The evidence was conflicting and would support either the allegations of the complaint to the effect that she was thrown from the car, or the somewhat equivalent theory that she involuntarily jumped therefrom under the influence of an excitement naturally caused by the accident. It was held that an instruction to the effect that the plaintiff could recover, only, if she was thrown from the car, and which necessarily implied that she was not entitled to recover, if she jumped from the car involuntarily, through the effect of fear, was erroneous. A judgment for the defendant was reversed and a new trial was granted.

3. Telephone Wires Across Trolley Wires — Use of Guard Wires. — In the case of *Burton Telephone Company v. Gordon*, 25 Ohio Cir. Ct. 841, an action was brought to recover damages for injuries to a traveler upon the public highway by reason of coming in contact with a broken telephone wire which was heavily charged with electricity, caused by its falling across trolley wires of an electric company.

It was held that whether or not it was the duty of the telephone company to safe-guard its wire by guard wires or other appliances to prevent it from becoming dangerously charged was a mixed question of law and fact under the circumstances of each particular case.

Judgment for plaintiff affirmed.

4. Safe Place to Work—Injury from Contact with Ends of Spliced Wires — Inspection — Insulation of Wires. — In the case of *New Omaha Thompson-Houston Electric Light Co. v. Rombold*, 68 Neb. 54, 97 N. W. 1030, *reversing* 8 Am. Electl. Cas. 654, 93 N. W. 966, it appeared that the action was for injuries sustained by coming in contact with the ends of spliced wires, which ends, it is alleged, were not insulated. The court said: "We are satisfied with the conclusion reached in the former opinion upon every question, save that relating to the eighth paragraph of the charge to the jury, which is as follows: 'It was the duty of the defendant company to exercise ordinary and reasonable care to render it safe for the plaintiff to work on its poles and among electric light wires. If such a degree of care and caution required such wires to be insulated, then it was negligence in the defendant to permit said wires, or a wire or part of a wire, to be without proper insulation, and thereby subject its linemen to risk of injury; and if, by reason of a want of such insulation, a lineman, without fault on his part, suffers injuries, then the negligence of the company would be actionable, and the injured lineman could recover proper damages.' It is undoubtedly a general rule of law that the employer is bound to exercise reasonable care not to expose his employees to unreasonable or extraordinary danger by putting them to work in dangerous places or with dangerous tools and appliances. 2 Thompson on Negligence, 972; Wood's Law of Master and Servant, § 198. This rule not only makes it the duty of the employer to provide suitable tools and appliances in the first instance, but also to use all reasonable care in

keeping them safe and serviceable, and to make seasonable inspection of the condition thereof with that end in view. *Union Stock Yards v. Goodwin*, 57 Neb. 138, 77 N. W. 357; *Brann v. Chicago, etc., R. R. Co.*, 53 Iowa 595, 6 N. W. 5, 36 Am. Rep. 243; *Ford v. Fitchburg R. Co.*, 110 Mass. 241, 14 Am. Rep. 598; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Solomon R. R. Co. v. Jones*, 30 Kan. 601, 2 Pac. 657; *Chicago, etc., R. R. Co. v. Jackson*, 55 Ill. 492, 8 Am. Rep. 661. The foregoing rule is subject to many qualifications and exceptions, one of which is that, where from the nature of the work, the contract of employment, or other facts and circumstances, it is the duty of the employee to make inspection and discover defects in the tools or appliances furnished him, the employer is not liable for an injury resulting to such employee from a defect which the latter, by reasonable inspection, could have discovered. *McGorty v. S., etc., Tel. Co.*, 69 Conn. 635, 38 Atl. 359, 61 Am. St. Rep. 62, 20 Am. & Eng. Enc. of Law (2d ed.) 142, and cases cited. In other words, under such circumstances, it is no longer the duty of the employer to protect the employee against such defects, but of the latter to protect himself.

"One of the theories of the defense in this case, abundantly supported by the evidence, is that it was a part of the duty of the plaintiff as a lineman, from the nature of his work, his contract of employment, and the facts and circumstances in the case, to inspect the wires, among which he worked, for defects and imperfections, including such defects as those alleged to have caused the injury in question; that a reasonable inspection would have disclosed such defects; and that he failed to make such inspection. In other words, one of the issues of fact in the case is whether it was the duty of the defendant to protect the plaintiff from the defects in question, or whether that duty devolved upon the latter himself. The instruction referred to is to the effect that such duty devolved upon the defendant, and amounted to the direction of a finding against the defendant on that issue. That, in view of the evidence, which, to say the least, is sufficient to entitle the defendant to the submission of that issue to the jury, is erroneous. We have not overlooked the qualification in the instruction that the injury must have been without fault on the part of the plaintiff. But it is obvious, we think, that this was not intended to qualify or limit the duty imposed upon the defendant by the first sentence, but rather to cover the theory of contributory negligence. As thus qualified, the instruction still assumes that the duty devolved upon the defendant, which was one of the questions for the jury.

"We have examined the other instructions in this case, especially those relating to contributory negligence and the assumption of risks by an employee, and find nothing that would warrant us in holding that the error hereinbefore pointed out is cured by any other portion of the charge. The plaintiff contends, however, that the defects in question were in the original construction of the line, and were not such as the plaintiff could be expected to look for or discover. But the evidence is amply sufficient to sustain a finding that it was the duty of the linemen to look for and discover, not only defects which arose from accident or wear or tear, but defects of every character, including those in the original construction. Hence, whether the defects which caused the injury were in the original construction, or originated afterward, is immaterial for present purposes.

"It is recommended that the former judgment of this court be vacated, that

the judgment of the District Court be reversed, and the cause remanded for further proceedings according to law."

5. Electric Railway Companies — Death from Electric Shock While Rescuing Co-employee. — In the case of *Whitworth v. Shreveport Belt Railway Company* (La.), 65 L. R. A. 129, NICHOLS, C. J., in writing the syllabus, said: "Potts and Whitworth, employees of the telephone company, were engaged in stretching a line of that company upon its poles. In doing so, the line had to be passed above the span of the electric car system. Potts, upon a telegraph pole, was holding one end of the wire, while Whitworth, upon the ground, was holding the other. The latter stumbled, and in doing so dropped his end of the wire which fell to the ground resting upon the span wire below, which, by reason of defective insulation in the hanger by which the trolley wire and the span wire were connected, was heavily charged with electricity. Potts, holding the other end of the wire, instantly received a shock and fell head foremost, but his spur caught on a spike on the telephone pole and he hung suspended in the air. Whitworth ran to his relief, and, catching hold of the wire of his own company which he had been using, to do so, he himself was instantly killed. *Held* that Whitworth in going to the rescue of Potts was not in fault but was acting under a high sense of moral duty, and for his death while engaged in the performance of that duty, occasioned by the negligence of the electric company, it is responsible in damages.

6. Lightning Entering Buildings over Telephone Wires — Pleading. — In the case of *Cumberland Telephone & Telegraph Co. v. Floyd*, 112 Tenn. 304, 79 S. W. 795, appeal was taken from a judgment in favor of the plaintiff. The court said: "This action was brought by defendant in error against the Cumberland Telephone & Telegraph Company to recover damages for the alleged wrongful killing of his intestate. In the declaration it was averred that this company 'negligently constructed and negligently maintained' its telephone wires over and across the tollhouse 'of a public highway, in an unlawful and dangerous manner,' and that while in this condition these wires became heavily charged with electricity, from a storm prevailing, so that plaintiff's intestate, then standing on the porch of this house, received the full force of an electric current diverted from them, and was killed.

Thus, in an action on the case for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will not operate as a denial of plaintiff's occupation of the house, but will of the averment of the nuisance. Id., 519. On the other hand, and as bearing directly on the question in hand, in an action for erecting a cesspool near a well, and thereby contaminating the water of the well, this plea puts in issue the averment of the creation of the cesspool, and that the water of the well was thereby contaminated. *Norton v. Scholefield*, 9 Mees. & W. 665.

* * * * * * *

"It certainly would be a curious anomaly in practice should it be held that the plea of not guilty raised the general issue in the present case, yet that its effect was to admit the averment of negligence upon which the plaintiff rests his right to recover. No such result follows. The burden was on plaintiff to make out his case, and, failing in the particular indicated, the judgment is reversed."

7. Incorporation of Electric Light Companies — Eminent Domain. — In the case of *Brown v. Radnor Township Electric Light Co.*, 208 Pa. St. 453, 57 Atl. 904, a suit was brought to restrain an electric light company from stringing its wires and erecting its poles along a turnpike, the abutting owners holding a fee in the bed of the road. It was contended that, under the statute, a lighting company could not be incorporated for a township and that it could not exercise the power of eminent domain, but the court, construing the statutes, held that an electric light company might be incorporated for a township, and that under the power of eminent domain it might enter upon the bed of a turnpike road and erect its poles and string its wires, notwithstanding the objection of abutting owners who owned a fee in the bed of the road.

8. Establishment of Electric Lighting Plant by City — Purchase of Existing Plant — Statutory Authority. — In the case of *Norwich Gas & Electric Co. v. City of Norwich*, 76 Conn. 565, 57 Atl. 746, an application was made to the court by the Norwich Gas & Electric Company to compel the defendant to purchase the plaintiff's lighting plant pursuant to statute. The statute in question (General Statutes, §§ 1978–1997) provides that a city about to establish a municipal lighting plant may be compelled to purchase a private plant, and that a commission may be appointed by the court to decide as to the price and conditions of sale. It was held: (1) That the commissioners could not decide as to the constitutionality of the statute. (2) That the commissioners were not "judges" within the meaning of the State constitution. (3) That the act did not confer "exclusive public emoluments or privileges" upon the plaintiff in violation of the State constitution. (4) That the commission in ascertaining the value of the plant committed no error in taking into account its earning capacity as a going concern.

NEW OMAHA THOMSON-HOUSTON ELECTRIC LIGHT CO. v. ANDERSON.

Nebraska Supreme Court — Jan. 5, 1905.

73 Neb. 49, 102 N. W. 89.

INJURY TO FIREMAN — ELECTRIC LIGHT COMPANY NOT INSURER — NEGLIGENCE — EVIDENCE. — 1. In the absence of any municipal ordinance or statute changing the rule, a fireman who enters upon property without any special authority or invitation of the owner is a bare licensee — made such by public necessity — and takes the risk of the premises as he finds them.

2. A member of a truck company, who assists to hoist a ladder with metallic corners against an electric light wire, cannot, in the absence of invitation or permission of the owner, complain that the wires were not properly insulated, and that he was injured because of such lack of insulation.

3. A claim for injury by an electric shock cannot be sustained by a mere hypothetical claim that such shock was only rendered possible by a ground current negligently permitted at some other point in the circuit by defendant; it not appearing that any usual precautions to prevent such grounding had been omitted, or that defendant had, or, under the circumstances ought to have had, knowledge of it.

4. Section 1 of ordinance numbered 4363, of the city of Omaha, *held* to impose no duty on the defendant light company, except to furnish a competent lineman to act under the city authorities' direction in disconnecting wires.

5. The furnishing of electric currents for power and lighting purposes is a recognized business, which must be conducted with due regard to the safety of both employees and the public, in view of the dangerous character of such currents, but their furnishers are not insurers against all dangers from them. Blameless casualties may arise from their operation.

6. A lineman of the electric light company, while acting at fires under the direction of the city authorities in pursuance of the ordinance before mentioned, cannot render the company liable by his words or acts in the absence of special authority.

7. *Held*, that in the present case there is neither allegation nor proof that defendant, after knowledge of the dangerous position of deceased, negligently omitted to turn off its electric currents.

(Syllabus by the Court.)

Error by defendant from judgment for plaintiff. *Reversed.*

W. W. Morsman, for plaintiff in error.

James H. Van Dusen, for defendant in error.

Electric Light Company Not Insurer. — See note to *Guest v. Edison Illuminating Co., post.*

Opinion by HASTINGS, C.:

In this case the intestate of the plaintiff died as a result of an electric shock received by him while serving as a fireman, in lowering a truck ladder by means of a crank, on August 9, 1899. The ladder was so constructed, with straps along its side, that it presented metal corners capable of cutting the insulation on defendant's wires, and it had a metal connection from the top to the bottom, capable of carrying down electric currents. The wooden spokes of the wheels of the truck, on whose platform the ladder was resting, constituted an insulator, and the firemen, in wet clothing, holding the cranks, by which the ladder was being lowered, and standing with wet feet upon wet ground, served to complete the ground connection, and a current down the ladder, through the cranks, and through the workmen to the ground, was the result. The fire had occurred on the south side of Howard street, between Eleventh and Twelfth, in a building running back to the alley; and forty feet above the alley the defendant company had secured the right to maintain its conducting wires, and was maintaining them there, to the number of eleven. The wires were carried on what is known as an "arch" — a piece of timber resting upon poles at each side of the alley. The arch crossed the alley practically on a line with the west wall of the burning building. Of the eleven wires, numbering them from the south, the first, second, and third were not touched by the ladder. The fourth and fifth constituted what is called "Opera House Circuit," and, when in use, carried a current of 2,000 volts. The sixth was one side of a street arc light circuit, the other side passing back by another route. Wires 7, 8, and 9 belonged to a secondary circuit, used for supplying incandescent lights, and intended to carry a maximum current of 216 volts. The other two wires were used for supplying power, and when in operation carried a current of about 500 volts, according to the testimony. One witness says that the insulating material on the wires was apparently ragged, but no one claims that there was, before contact with the ladder, any uninsulated wire at the places of contact. The fire occurred about or shortly after 5 o'clock on August 9th. A hose was laid from a hydrant near the intersection of the alley with the west side of Twelfth street, along the alley, to the rear of the burning building. The truck, with this ladder, entered the alley at Eleventh

street, and came west until opposite the north end of the burning building. The truck stopped under the wires, with the front toward the west, and on the north side, so that, by the slope of the alley towards its center line, the south side of it stood a little lower than the north. It carried an extension ladder, which could be raised about seventy-five feet, and which extended back from its base on the truck about forty feet. It was raised by means of a crank and machinery attached to the front axletree of the truck. The machinery comprised a turntable, by which the ladder, when raised, might be turned, through the use of the crank, to face any desired direction. The ladder was of seven or eight hundred pounds weight and thirty-two inches wide. The "barrels" of the ladder were bound with iron straps, making sharp iron angles on the outside corners of the barrels. It was old, and would sway from side to side, and spring up and down, in the process of raising. Iron straps on its side were connected from the top to the bottom, and with the machinery to which the cranks were attached. The truck also carried a portable ladder about fifty-four feet long, and others of various lengths — from eighteen to thirty-five feet — and a pair of insulated shears for cutting electric wires. The city electrician, Schurig, was present when the truck came into position. When the ladder was just commencing to be raised, the electrician was standing about ten or fifteen feet in front of the truck. Lieut. Sullivan, now captain in control of the truck, asked if the wires ought to be cut. The electrician replied that they should, and that he would cut them if the lieutenan

it was some six or seven feet east from the arch. On the arch the wires were fastened fourteen inches apart. It then extended four or five feet above the wires, and was turned about, facing toward the south, and was permitted to incline south, toward the burning building. The upper end remained five or six feet away from the north wall of the building. The ladder was then extended twenty-five feet more above the wires, and remained so until the fire was extinguished and it was ordered taken down. It was then once more drawn to a perpendicular position, brought by the use of the turntable so that the rungs were once more at right angles with the alley and with the wires, and by means of the cranks the men were proceeding to let it down between the same wires. They had not made to exceed two turns of the crank, which would let the ladder move towards the east along the wires about two feet, when it caught upon the arc circuit wire, No. 6, on the south side. This prevented its coming further. Livingston, a fireman, started up the ladder to loosen it; declining to take Officer Sullivan's gloves, because they were wet. Defendant's lineman Brinkman, who had come to the fire and was standing by, remarked, "That wire is dead," or "Those wires are dead." The ladder was then held fast on the south side by this wire No 6, and Livingston was unable to release it until it was raised nearly two feet. This was done, and he released the wire without shock. The ladder was not then in contact with wire No. 5. Livingston went down, and, with the other men, proceeded to lower the ladder, making five or six revolutions of the cranks, when the shock was received by which four of the men were killed. The shock did not produce instant death, or throw the men from the cranks, but rendered them incapable of letting go, and held them until life was so nearly extinct that their bodies fell to the ground. The men were wet both by water and perspiration, and they were standing in pools of water and mud. Farmer and Livingston, who had also hold of the crank received only a slight shock. All the evidence goes to show that at the time of the electric discharge the ladder was in contact with wires 6 and 7 only. Such is the testimony of the city electrician. It is hardly possible that there can be any error about this, for the ladder was left standing some time in the position in which it was when the shock came, and was not taken down until the defendant's line-

man Brinkman had telephoned to the power station, and had the currents through this alley all cut off.

The foregoing statement is drawn from the most part from the brief filed on behalf of the defendant company. Plaintiff's counsel, as to defendant's statement of facts in the brief filed, says, "I desire to state that it is, in the main, a fair statement, although I would not be willing to admit that all propositions therein stated were established by the undisputed testimony." The only important matter of fact as to which any dispute is found is concerning the insulation of the wires. The legal duty of defendant, as fixing the question of its negligence, is the main subject of dispute, together with the inferences to be drawn from the facts, and especially the extent to which the fact of a terrible casualty should be considered as establishing negligence, on the principle of *res ipsa loquitur.*

The defendant claims that it owed no duty whatever to the fireman Hopper in reference to its lines. It is conceded that these firemen, in pushing their ladder against defendant's wires, were not trespassers, because they were acting in public right, and were entitled to invade the defendant's property for the purpose of securing public protection against fire; but it is claimed that they were bare licensees, who pushed their ladder against defendant's wires without permission, for their own purposes, and at their own risk. It is also urged that no defect of insulation, which was in any degree the company's fault, is shown to have had anything to do with the accident. The defendant admits that one

current of electricity carried thereby to escape into the earth, and failed to so construct its system of wires as to prevent connection with the earth which would carry the current of electricity to the earth. (3) That the defendant negligently and carelessly failed at said time to disconnect the wires in said alley so as to prevent them becoming a menace to the lives of the firemen and plaintiff's intestate. (4) That the defendant negligently and carelessly failed to notify plaintiff's intestate and the other firemen that the said wires, or any of them, were grounded or connected with the earth so as to carry the current of electricity to the earth, and thereby render them dangerous to life. (5) That the defendant failed and neglected to notify the said Charles A. Hopper and others that the said wires were charged with electricity, which would be dangerous to the lives of persons coming in contact with them. (6) That the defendant negligently and carelessly failed to keep its wires so insulated and protected that the said Charles A. Hopper and others would be injured as a result of coming in contact with them. (7) That the lineman in the employ of the defendant when the ladder was about to be lowered to the truck notified the fireman and Charles A. Hopper that the wires upon the poles in the alley were dead wires, and that it was not until after such notification that the firemen and said Hopper commenced to lower the ladder by means of the machinery upon said truck."

This summary is acknowledged by plaintiff's counsel to be correct, except for one omission. Plaintiff says that the petition also charges that it was the defendant's duty, under the city ordinances, to have its lineman at the scene of the fire for the purpose of removing "deadly wires," so that plaintiff's intestate would not be injured by them, but that the defendant negligently failed to perform such duty, to Hopper's injury. The summary, therefore, with this addition, may be taken to fairly represent the case which the plaintiff seeks to make. It is that defendant's wires were not properly insulated; were negligently permitted to become grounded; were not disconnected at the fire so as to prevent their being a menace to life; that no notice was given of the grounding; that no notice was given of danger from the wires; that deceased was told by defendant's lineman the wires were dead, and after such notification the ladder was lowered upon them; and that defendant failed in its duty under the ordinance "to have its men on the ground for the purpose of removing deadly wires, so that plaintiff's intestate would not be injured thereby." Plaintiff's counsel is still, he says, insisting on each of these claims, but his brief lays no stress upon the matters of insulation and grounding. The action of the defendant's lineman, and the failure to discharge its duty under the ordinance, constitute, apparently, the negligence relied upon. The matter of grounding (that is, the claim

that no dangerous current would have come down the ladder if there had not been permitted to exist some other connection with the ground to complete the circuit), and that the permitting of such other connection was negligent, is not argued, except by reference to another case. This other grounding is entirely hypothetical. If it existed, it was without defendant's knowledge then or since, so far as the evidence shows, and had never been located. If any liability arose on its account, it would be on the theory that an electric current is like a dangerous animal, for whose restraint the keper is absolutely liable. Some expressions drawing such analogy are quoted by plaintiff from various decisions, but no holding of such a liability is cited.

As above suggested, the defendant declares that it owed no duty to these firemen whatever; that such right of entry as they had upon defendant's wires, they had against the wires, and not against the owner, and that, by way of preparation for such invasion, the owner was not bound to insulate, nor to do anything except refrain from resistance, and from establishing anything in the nature of a trap, to the firemen's injury; that the latter were bare licensees; and that the duty of the company is fully discharged if it permits them, without resistance, to go upon its premises.

"The law of overruling necessity licenses this, and will not suffer the owner of a lot to stand at its borders and exclude those who would use his premises as vantage ground in staying a conflagration." Cooley on Torts (1st ed.), 313.

finds them. In *Richards v. Connell,* 45 Neb. 467, 63 N. W. 915, the owner of a pond of a dangerous depth is held not required to fence it, or to otherwise insure the safety of strangers, old or young, who may come to the premises, not by invitation, express or implied, but for purposes of amusement, or from motives of curosity. In that case this court says the liability of the owner for injury incurred on his premises results in three classes of cases: (1) Where the owner had made or permitted some construction dangerously near to a public highway, so as to injure one in the rightful use thereof; (2) has left negligently exposed dangerous machinery, likely to attract children, and resulting in their injury, as in the Turntable Cases, which constitute a recognized exception to the rule; (3) where the injured party was present by the invitation, expressed or implied, of the owner. In *Hamilton v. Minnesota Desk Mfg. Co.,* 78 Minn. 3, 80 N. W. 693, 79 Am. St. Rep. 350, where a fireman fell through an uncovered elevator shaft, it was held that he could recover no damage for his injury, and the rule is stated as follows:

"By the rules of the common law, a fireman going upon the premises of another under the circumstances appearing in this record could not recover damages for such an injury. However hard such a rule may seem, it appears to be settled that the owner or occupant of a building owes no duty to keep it in a reasonably safe condition for members of a public fire department who might, in the exercise of their duties, have occasion to enter the building."

In *Woodruff v. Bowen,* 136 Ind. 431, 34 N. E. 1113, 22 L. R. A. 198, in which the plaintiff's intestate and ten other firemen were killed by the falling of a roof on which they were standing in discharge of their duty, negligence in constructing the building, and knowledge of its unsafe condition on the part of the owner, were alleged. Recovery was refused. The court says:

"We think that the authorities fully establish the rule that the licensor owes to the mere licensee no duty except that of abstaining from any positive wrongful act which may result in his injury, and that the licensee takes all risk as to the safe condition of the premises upon which he enters. To the question now under discussion, decisions based upon express statutes or ordinances, as well as decisions based upon the fact that the injured party entered the premises under an invitation, expressed or implied, are not applicable. We are of the opinion that the owner of a building in a populous city does not owe it as a duty at common law, independent of any statute or ordinance, to keep such building safe for firemen or other officers who in a contingency may enter the same under a license conferred by law."

A similar holding is found in *Faris v. Hoberg,* 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261, where the plaintiff entered a store from the alley at the back door and fell into an open eelevator shaft. The visitor was held to be a mere licensee, and unable to recover, because there was no duty on the owner's part to keep the premises safe for such an intrusion. In *Augusta R. Co. v. Andrews,* 4 Am. Electl. Cas. 378, 89 Ga. 653, 16 S. E. 203, a lineman for a telephone company, in doing his work, placed a telephone wire above and across a fire alarm wire, and for this purpose ascended the pole of the fire alarm system, and while on the pole, in passing the telephone wire over the fire alarm wire, he received an electric shock which caused him to fall. He claimed that a street railway company had been negligent in constructing a feed wire so that it came in contact with the fire alarm wire and charged it with a dangerous current, and that this negligence was the sole cause of his injury. It was held that the street railway company owed him no duty, and was not liable for any injuries that happened to him while, without permission, he was a trespasser upon the pole of the fire alarm system. *Hector v. Boston Electric Co.,* 5 Am. Electl. Cas. 300, 161 Mass. 558, 37 N. E. 773, 25 L. R. A. 554 (also on rehearing, 174 Mass. 212, 54 N. E. 539, 75 Am. St. Rep. 300), is a case wherein the electric company and a telephone company were jointly using a standard on the roof of a building in Boston to support their wires. They also maintained their wires over the roof of another building, but not jointly; their wires there being in separate groups. Plain-

held to acquire no right of action for a fatal shock from a guy wire charged with electricity from defendant's plant. The controlling precedent is said to be *Hargreaves v. Deacon,* 25 Mich. 1, in which recovery was denied for the death of a child of tender years, who fell into an uncovered cistern, not adjoining a highway, and which had not been left uncovered with design or expectation to harm any one.

The cases seem to establish that, in the absence of any statute or ordinance prescribing a duty toward firemen on the part of the owner of premises, the latter is not liable for anything short of a designed injury. The trial court, however, seems to have instructed the jury on the theory that there was a duty to insulate for the protection of firemen, merely as such, and that there was evidence of this duty having been unperformed. We are constrained to think that, under the circumstances, the firemen had no right to rely upon any insulation, and that there is no sufficient evidence that a failure to properly insulate defendant's wires had anything to do with causing this injury.

The trial court instructed as to this matter as follows:

"I further instruct you that those who employ in the prosecution of their business a palpably and highly dangerous agency, such as electricity, are bound to exercise such precautions to prevent injury to others as the emergency would reasonably seem to require; and, where wires of an electric company extend along and over and above the streets and alleys of a city, carrying a highly dangerous current of electricity, the law requires the exercise of care, skill, and caution, commensurate with the danger to be apprehended, in the construction, inspection, and repair of the wires, so as to keep them harmless at places where persons are liable to come in contact with them."

By the ninth instruction the jury were told that if they thought that a reasonable degree of care and skill required defendant to keep all its wires securely insulated, and keep them from ground connections, then a failure to exercise such caution would be negligence, and render defendant liable, and that whether or not such care had been exercised by the defendant was a question of fact for the jury's decision. The tenth instruction was in these words:

"The evidence shows that Hopper at the time he lost his life was engaged at work in this alley, where he had a right to be, in pursuance of duty under his employment by the city of Omaha as a public fireman. You are instructed that it was therefore the duty of the defendant company to use and exercise care, skill, and caution commensurate with the danger to be apprehended, as explained in these instructions, in the insulation of its wires running over

and along the said alley, and in the transmission of the currents of electricity on said wires, at such places as the deceased, in the proper discharge of his said duties, might come in contact therewith."

No attempt is made on the part of the plaintiff to sustain this portion of the case. No authority is given for throwing an absolute duty to so insulate its wires as to resist attacks such as are shown in this case on the company, nor for a like duty as to preventing ground connections. It is not thought that while operating its lines the defendant company was an insurer to either firemen or others that the insulation of its wires could not be penetrated by the edges of this ladder. A jury ought not to be permitted to find such a duty, as a matter of fact, from the evidence in this case.

It is urged, however, that there was a duty resting upon the defendant at the time of this accident to "disconnect and remove any wires or cables which might become a menace to life and property." Sections 53 and 131 of the city charter, as then existing, are cited as giving the city council general authority to make police regulations for the welfare, health, safety, and security of the city, and to pass proper ordinances therefor. Special authority was given to regulate and provide for street lighting, electric power, or other apparatus, and to regulate electric wires, poles, and the placing of wires thereon, or to require their removal from public grounds, streets, or alleys. March 1, 1898, the following ordinance was adopted:

"Section 1. That all corporations, companies, and individuals owning and operating overhead wires shall in time of fire send one or more linemen to the scene of fire, who shall report to the chief of the fire department or the city electrician, and they shall disconnect and remove any wires or cables which may become a menace to life and property."

It is claimed on behalf of the plaintiff that under this ordinance it was the defendant's duty to have a lineman at the fire, and to decide, at its peril, what wires were a menace to life and property, and, if any were found to be so, to remove them. The defendant, on the other hand, says that the only duty imposed upon the company by this ordinance is to furnish a lineman, and at this fire one was present. The defendant asserts that the provisions for the lineman to report for duty to the chief of the fire department or to the city electrician, and that "they shall disconnect" any unsafe wires, makes the lineman a mere subordinate, whom the

light company must furnish to act under the orders of the chief of the fire department or the city electrician. Defendant says that it is obvious that the general control at a fire must be in the hands of the city authorities, that it is plain that the ordinance intended to confer no authority upon the defendant as to what wires should be removed or disconnected, and that it therefore leaves the defendant no responsibility. It seems that prior to this ordinance the city had its own fire alarm system, and had linemen in its service, who were attached to the fire companies, to attend fires and take care of wires; that the fire alarm service was turned over to the telephone company, and by this ordinance the electric company was required to furnish the linemen. It is urged that the city retained the same control over them which it had previously held over those employed by itself. Counsel for plaintiff says that this ordinance is a remedial one, and is to be liberally construed, so as to remedy the mischief which existed. This may be granted, but what is the michief to be remedied? The firemen have the right to go upon premises and take such measures as they find necessary for the purpose of preventing or extinguishing fires, and no citizen has any authority to resist any action which they may take. They are not, however, presumably skilled in the handling of electric wires. The defendant's lineman is presumably able to make connections and disconnections without risk to himself or others. It seems rational to conclude that he is required for that purpose, and that this police control of emergencies, and power to direct action as to wires, must remain with the city authorities, and that they are not under obligations to accept any advice, orders, or instructions from these linemen who are required to report to the fire chief or city electrician.

Plaintiff claims that the pronoun "they," as used in this ordinance, refers to the linemen. Doubtless it refers to the linemen, together with the city electrician and chief of fire department, as the case may be. The disconnection must be, as above stated, in the control of the city. It is apparently intended to be carried out by the linemen. It may be granted that, if the absolute duty to remove all wires dangerous to life and property rested upon the defendant, the evidence in this case shows conclusively such duty was not performed. The wires were not removed, and the death

of four firemen from contact of their ladder with these wires resulted. With the contention of counsel, however, that the defendant was in such control of the management of the electric wires, in connection with the raising of this ladder on the part of the firemen, as to cast upon it any such absolute liability, it is not possible to agree. The ordinance cannot be construed to create such a liability. We do not think a violation of it by defandant was shown.

It is contended on plaintiff's behalf that there is a cause of action against the defendant, arising out of the statement of defendant's lineman, made as Livingston was ascending the ladder to release it when caught against No. 6 (the arc-light wire), "That is a dead wire," or "Those wires are dead." It is claimed that Brinkman was acting as a servant of the company; that his words were an invitation to continue lowering the ladder between the wires, and rendered defendant liable for the consequences. It is claimed on the other hand by the defendant, with extensive authority, that Brinkman, in acting as a lineman at that fire, was acting, not on behalf of defendant, but as a lineman for the city; that responsibility for the acts of a servant depends upon authority over him; that the defendant was compelled to furnish linemen, but had no authority or control over them, and was no more responsible for what he said than for how he acted.

Western Union Telegraph Co. v. Mullins, 44 Neb. 732, 62 N. W. 880, is cited for the following passage:

> "It is familiar law that a master is not liable for the acts of his servants, unless those acts have been done in the line of the servant's duty, and in furtherance of the master's business, or, as sometimes expressed, the acts must be within the servant's apparent scope of employment."

In that case misinformation as to the relative location of Glenwood Springs, Colo., and Seattle, Wash., by the telegraph company's agent, was held to give no right of recovery, although it was in connection with the delivery of a message, and the misinformation caused the plaintiff considerable expense. The telegraph company's clerk was held to have no employment warranting him in giving to travelers such information on behalf of the company. In *National Fire Insurance Co. v. Denver, etc., Electric Co.* (Colo. App.), 7 Am. Electl. Cas. 715, 63 Pac. 949, where the owner of a building had been mislead to his prejudice by mis-

statements that there was no danger to a building from the wiring, he was held to have no right of action against the company: the servant having no authority to advise outside of the particular adjustment he was sent to make. In *Coughlan v. City of Cambridge,* 166 Mass. 268, 44 N. E. 218, the city was held liable for an injury to an employee engaged in working on a gravel train which had been furnished under contract, with its equipment fully manned, to the city by a railway company. It was held that the negligence by which plaintiff was injured was negligence of the city. "The test is whether, in the particular service in which he is engaged, he continues liable to the direction of his master, or becomes subject to that of the party to whom he was lent or hired." To this last proposition four other Massachusetts cases and one English case are cited. *Miller v. Railroad Company,* 76 Iowa, 655, 39 N. W. 188, 14 Am. St. Rep. 258, and *Hitte v. Railway Company,* 19 Neb. 620, 28 N. W. 284, are cited to the same proposition. In the last-named case, suit was brought for the killing of plaintiff's intestate by a train on defendant's road; but it was shown that at the time the road was in process of construction, and the entire work, including the management of the train which did the injury, was under the control of the contractor, and the train and its crew were furnished to the contractor by the railroad company to advance the work. It was held that there could be no recovery. "In the case it appeared that Fitzgerald was clearly an independent contractor. He had the use of the engine and the cars of defendant as a part of the consideration for the work performed by him, and, if the engineer and fireman of the train which did the damage were borne upon the pay rolls of the defendant while working upon the contract, as claimed by counsel for plaintiff, * * * doubtless their compensation was fully accounted for by the contractor to the company. I conclude, therefore, that the train * * * was not being run by or under the control or management of the defendant company, and that the defendant company is not bound to respond to any damage suffered through or by reason of negligence of the engineer, conductor, or other persons in charge of the said train."

It appears in the present case that the city electrician was present, and that he had, before any statement by Brinkman, told the lieutenant in charge of the truck company that one of the wires

against which the ladder was being pressed was dead at that time of day, and that the other was low-pressure one. Brinkman's assurance was simply added to his, and the action of Livingston in going up and loosening the ladder was already in progress when Brinkman made this remark — "That is a dead wire," or "Those are dead wires." White had previously gone up and safely lifted both of these wires out from between the "barrels" at the head of the ladder. The work which was then under way was successfully accomplished on the part of the fireman who with his bare hands picked up this wire No. 6. It is true that he was standing on a rung of the ladder, and not upon wet and muddy earth. It must be conceded that if the defendant had an absolute duty to perform in the removal of these wires, and the taking away of any which was a menace to life and property, the lineman sent to perform that duty on defendant's behalf would be acting for defendant, and his negligence would be the company's. But as above stated, we do not think that any such absolute duty can be claimed to result either from the general doctrines of the law, or from this ordinance of the city.

A large part of plaintiff's brief is devoted to the proposition that the defendant is chargeable with knowledge of the deceased's dangerous position, and with almost, if not quite, criminal negligence, in continuing to send its current through these wires notwithstanding such knowledge. We have been unable to find in the petition an allegation of negligence in this particular. It is true that the third allegation of negligence is that the defendant failed to disconnect the wires in said alley so as to prevent them becoming a menace to the lives of the firemen and plaintiff's intestate, but this cannot be considered an allegation of failure to turn off the current after learning the position of the firemen. The plain intention of the pleader was to complain of the inaction of the linemen who were present at the fire. They, however, had no more knowledge than had the city electrician that there was any occasion for turning off the current.

The evidence seems to show that, for some unexplained cause, a most surprisingly severe shock came from one of the low-pressure wires which the linemen, like the city electrician, supposed was harmless. There is no evidence for the support of this claim of neglect to exercise due care after the firemen were known to be

in danger, except the fact that the firemen are dead, and that it was undoubtedly an electric shock which killed them. "*Res ipsa loquitur,*" as counsel says. But it is only when defendant is under an absolute duty to prevent results that their appearance shows negligence. Black's Law Dictionary, *sub. voce.*

It is not necessary in this instance to pass upon the defendant's contention that there must be some contractual relation, actual or implied, between the injured party and the person whose negligence is asserted, in order to create a cause of action by a mere failure to perform. In other words, there must be a legal duty. If the injury to this fireman had arisen when he was engaged merely in working upon the surface of the street, instead of raising a ladder in the air to touch these wires, another question would be presented. The defendant was only authorized to make such use of the alley as would not interfere with its use as a highway. It must put no dangerous constructions near enough to the highway to imperil those rightfully passing. Danger to firemen pushing a metallic-bound ladder against the wires, it had no duty to provide for, except by furnishing a lineman to disconnect them if deemed necessary by those in charge of the fire extinguishing operations.

In the case of *Mitchell v. Raleigh Electric Co.,* 7 Am. Electl. Cas. 644, 129 N. C. 166, 39 S. E. 801, 55 L. R. A. 398, 85 Am. St. Rep. 735, it was held that, where a telephone company and light company jointly occupied the streets, such joint occupancy gave enough of relationship between the parties, so that a telephone lineman who was injured because of defective insulation in the light company's wire had a right of action. But this case is clearly distinguishable from that of a fireman who invades the light company's wires with a ladder likely to cut the insulation on them, and who can claim no right at the wires, except to go there without resistance from the defendant. The fireman's rights were wholly against the wires, and not against the owner. The owner was without knowledge of his intention to use the ladder, and was under no obligation to render its use safe, or to attempt to do so. If the city requires better provisions for the safety of its firemen from these dangerous wires, it is entirely competent for it to so provide by ordinance. In the present case it seems impossible to charge any failure of legal duty against the

defendant upon the record made here. Of course, in such case, there is no need to discuss any question of contributory negligence.

A careful consideration of the record and each of the briefs of parties, together with the brief for defendant in error in the case of Bendson against the same light company, *infra,* which is cited by plaintiff's counsel, compels the conclusion that no duty to insulate for the protection of these firemen rested upon defendant at common law or by the ordinance. In the Bendson Case, counsel urge that the defendant company, with its wires, is itself only a licensee in the alley, and had not the rights of an ordinary property owner in these wires, which the city allows it to put up. Doubtless the city has the right to prescribe the terms on which they may be maintained. When those terms are complied with, however, the property of the light company has all the incidents of other property, except as those terms modify it. No modification, except the compulsory attendance at fires of a lineman, has been pointed out. It would seem that the defendant, as the owner of the wires, maintaining them at the required distance above the alley, had the same rights in them as the owner of a building would have in it, and that firemen would take the risk in pushing their ladder against the wires as they would in going against a building. The requirement to send a lineman to disconnect wires does not seem sufficient to change the rule. It seems to give no authority, and consequently to impose no responsibility on the defendant. If the last proposition is true, then the lineman, Brinkman, did not make his remark as to the wire being dead in

CENTRAL UNION TELEPHONE CO. v. SOKOLA.

Indiana Appellate Court — Jan. 11, 1905.

34 Ind. App. 429, 73 N. E. 143.

1. DEATH FROM CONTACT WITH TELEPHONE WIRE ACROSS ELECTRIC LIGHT WIRE — SUFFICIENCY OF COMPLAINT. — In an action against a telephone company for death resulting from contact with overcharged wires, a complaint, alleging that the defendant was notified to remove the dangerous wires five months before the accident, is sufficient to charge the defendant with notice.
2. SAME — WIRES ACROSS PRIVATE PROPERTY. — An electric company maintaining wires across private property owes a duty to persons not trespassers to maintain such wires in a safe condition.
3. SAME — WANT OF ORDINARY CARE. — A telephone company, which permits its wire to become broken and lie across a highly charged electric light wire, is guilty of a want of ordinary care.
4. SAME — EFFECT OF STORM. — The fact that a storm concurred to produce an injury will not relieve a telephone company from liability, where the storm and the defective condition of the company's wires were concurrent causes of the injury, and were both present and active in the result.
5. CONTRIBUTORY NENLIGENCE. — Whether a party had knowledge that a wire was charged was a fact to be considered by the jury in determining the question of his negligence in coming in contact with the wire.

Appeal by defendant from a judgment for plaintiff. *Affirmed.*

George Ford and *Hawkins, Smith & Hawkins,* for appellant.

George G. Feldman, for appellee.

Opinion by ROBINSON, P. J.:

Suit by appellee, as administrator, against appellant and the South Bend Electric Company for damages for the death of Anton Sozmankowski as the result of an electric shock from the wires of appellant and the electric company. Upon issues found, the jury returned a verdict against appellant telephone company, and on motion for a new trial judgment was rendered on the verdict. The errors assigned (1 and 2), question the sufficiency of the complaint; (3) overruling the motion for a new trial.

The only questions argued by counsel are those arising under the third assignment of error. A new trial was asked upon the grounds: (1 and 2) The verdict is not sustained by sufficient evidence, and is contrary to law; "(3) the court erred in giving instructions Nos 3, 4, 5, 6, 7, 8, 9, 11, and 13, on its own motion;

(4) the court erred in giving instructions Nos. 3, 4, and 6 asked by defendant South Bend Electric Company; (5) the court erred in refusing to give instructions Nos. 1, 2, 3, 3½, 5, 7, 10, 11, 12, and 14 asked by defendant Central Union Telephone Company."

Some confusion exists in the record, due, perhaps, to the fact that counsel for appellant who have briefed and argued the case in this court were not present at the trial in the court below. The instructions have been brought into the record under section 1 of the act approved March 9, 1903 (Acts 1903, p. 338, c. 193). As it is not claimed in argument, and could not be successfully claimed, that all the instructions mentioned in the third ground for a new trial are erroneous, the question as to whether any particular one of the instructions was correct is not presented. The same may be said of the fourth ground for a new trial. In each case the instructions enumerated are jointly questioned. *Young v. Montgomery,* 161 Ind. 68, 67 N. E. 684; *Jones v. State,* 160 Ind. 537, 67 N. E. 264; *Lautman v. Pepin,* 26 Ind. App. 427, 59 N. E. 1073. Neither is it claimed that all the instructions refused are correct, and as the assignment of the court's refusal to give the instructions requested was joint as to all the instructions refused, the fifth cause for a new trial presents no available error. *Crawford v. State,* 155 Ind. 692, 27 N. E. 931.

It is argued that the verdict is not sustained by sufficient evidence. The complaint avers that the South Bend Electric Company maintained on poles about twenty feet high and across certain lands certain wires for conducting electricity for lighting

used by it to supply telephone service as aforesaid, but it negligently retained them and suffered them to remain on the poles as aforesaid for no use or purpose;" that from May, 1902, until the date of the accident there were daily a great number of laborers and workmen at work erecting a dwelling about fifty feet south of the crossing of the wires, all of which facts appellant knew; that during this time appellant negligently permitted these unused wires "to become and remain loose from the poles and sag and break and come in contact with" the wires of the electric company, "and drop to the ground, and refused and neglected to remove them, although notified so to do five months before the accident;" that on "the 30th day of October, 1902, and for a long time prior to said date, the defendants negligently suffered and permitted their wires to be and remain crossed as aforesaid, uninsulated and defective insulation, without guards to prevent them from coming together, and out of repair, as aforesaid, and defendants negligently permitted the said telephone company's wire to break and drop on and across the said electric company's high voltage wire, and drop and sag to the ground, in negligent and reckless disregard of the safety of the persons rightfully upon said premises;" that on the 30th day of October, 1902, while appellee's decedent was engaged as a laborer about and upon the erection of such dwelling, "the defendants then and there negligently suffered the said defendant Central Union Telephone Company's wire, which was uninsulated, to hang across and come in contact with the defectively insulated and high voltage wire of the defendant South Bend Electric Company, and in such position and contact suffered it to sag and drop to within two feet of the ground, where he was at work as aforesaid, and because of the negligent acts and omissions in the erection and maintenance of defendant's wires by them as aforesaid, he, said decedent, then and there came in contact with said defendant Central Union Telephone Company's uninsulated wire, which was then and there highly charged with a deadly voltage of electricity by and from the electric company's high voltage wire as aforesaid; that because of the negligent acts and omissions of the defendants as aforesaid" a deadly voltage of electricity was, by his coming in contact with such wire, conducted by appellant's wires as aforesaid through the body of decedent, causing instant death; that decedent at the time of the

injury was ignorant of the condition of the wires and of the nature, force, and conduction of electricity.

We do not think it can be said that the complaint proceeds entirely upon the theory that appellant had actual notice of the condition of the wires, and that proof of constructive notice would not support the pleading. The complaint contains some unnecessary averments, and some acts of negligence are perhaps charged which it would not be necessary to prove. In such case it is necessary that a plaintiff "establish the substance of the issue." *Long v. Doxey,* 50 Ind. 385; *Owen v. Phillips,* 73 Ind. 284; *Phœnix, etc., Co. v. Hinesley,* 75 Ind. 1. The complaint, taking all its material averments together, proceeds upon the theory that appellant suffered and permitted its line and wire to become out of repair and in a dangerous condition, and to remain in this dangerous condition for a time sufficiently long that the law charges the company with notice. See *City of Indianapolis v. Tansel,* 157 Ind. 463, 62 N. E. 35.

It is averred that appellant was notified to remove the wires five months before the injury, but, if the proof fails to show such actual notice, but does show that the wires were maintained in a dangerous condition for such length of time as averred in the pleading, the law charges appellant with notice. Nor is it material whether the proof shows that appellant had actual knowledge that there were daily a number of laborers at work near the place where the wires were suffered to remain crossed. It is true it was upon private property, but it was a place where people

that time one of the telephone wires broke, and was removed. The other wire was left, and was fastened to the pole in the street and to the pole north of the crossing of the wires, the two poles being about 375 feet apart. About the 3d of October this wire broke at a point a little to the south of the building that was being erected, and was thrown off of the building by a workman to the north, and was suspended in an elm tree north of the building. The jury found it broke by its own weight. There is evidence that it was lying across the electric light wires from that time up to the time of the injury. The electric light wires were insulated. In answer to interrogatories the jury say that the night before the decedent's death there was a storm of wind and rain which dragged the broken wire through the elm tree and brought it into contact with the electric light wires, and that the telephone wire was not in contact with the electric light wires until the night before or the morning of decedent's death. But this is not necessarily equivalent to a finding that the evidence that the broken wire had lain across the electric light wires for three or four weeks was untrue. The insulation around the electric wires may have prevented the bare wires from coming in contact with each other until during the storm, and there is evidence that, if the telephone wire was grounded, and it was raining, and the ground wet, it would not take long for the electricity to burn through the insulation. The answer of the jury is not necessarily a finding that the telephone wire had not lain across the electric light wire until the night before or the morning of the injury.

It is argued that the record discloses that it was the force of the storm that was the immediate and proximate cause of the wires coming down and into contact with the electric light wires. But it does not appear that the storm was unprecedented, or that it was any more severe or violent than should reasonably be expected in that locality. There is evidence from which the jury could say that appellant was negligent in permitting the wires to remain in the condition they were in before the night of the storm. It is true these telephone wires were not in use, but they were the property of appellant, and the duty to maintain them in a safe condition was not different from the case of wires in actual use. If appellant permitted its wire to become broken and lie across the highly charged electric light wire, it was guilty of a

want of ordinary care. It would have reasonable ground to apprehend that electricity might be conducted over its wire. It is true the storm concurred to produce the injury, but appellant's prior negligence contributed to the injury, and this negligence cannot be said to be a remote cause, for the reason that whatever it did contribute it contributed at the time and place of the injury. The intervening storm and the defective condition of the wires were concurrent causes of the injury, and were both present and active in the result. See *Board v. Mutchler,* 137 Ind. 140, 36 N. E. 534; *City of Mt. Vernon v. Hoehn,* 22 Ind App. 282, 53 N. E. 654; *Jackson v. Wisconsin Tel. Co.,* 5 Am. Electl. Cas. 335, 88 Wis. 243, 60 N. W. 430, 26 L. R. A. 101; *Knouff v. City of Logansport,* 26 Ind. App. 202, 59 N. E. 347, 84 Am. St. Rep. 292; *Louisville, etc., R. Co. v. Nolan,* 135 Ind. 60, 34 N. E. 710; *Boyd v. Portland, etc., Co.* (Or.), 7 Am. Electl. Cas. 605, 66 Pac. 576, 57 L. R. A. 619; *Griffith v. New England, etc., Co.,* 7 Am. Electl. Cas. 707, 72 Vt. 441, 48 Atl. 643, 52 L. R. A. 619; Joyce on Electric Law, § 453; *Southwestern Tel., etc., Co. v. Robinson,* 50 Fed. 810, 1 C. C. A. 684, 16 L. R. A. 545; *Mitchell v. Charleston, etc., Co.,* 6 Am. Electl. Cas. 245, 45 S. C. 146, 22 S. E. 767, 31 L. R. A. 577; *Giraudi v. Electric, etc., Co.,* 5 Am. Electl. Cas. 318, 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114.

It is true the mere breaking of the wire did not establish negligence, but the negligence here charged is permitting the wire to remain in a dangerous condition after it was broken. Nor can there be a liability for an accident that could not be reasonably anticipated. But "it is, indeed, not necessary," said the court

was a fact to be considered by the jury in determining the question of his negligence in coming in contact with the wire. We find nothing in the record authorizing us to interfere with the jury's finding.

Judgment affirmed.

NORFOLK RAILWAY AND LIGHT CO. v. SPRATLEY.

Virginia Supreme Court of Appeals — Jan. 12, 1905.

3 St. Ry. Rep. 859, 103 Va. 379, 49 S. E. 502.

1. RES IPSA LOQUITUR — FALLEN WIRE. — Where a boy was injured while attempting to grasp a live wire which had fallen in the street, the doctrine of *res ipsa loquitur* applied, and the question was still for the jury though an employee of defendant testified to the inspection of the wire shortly before it fell and its safety at that time.
2. PLEADING NONINSULATION IN ACTION FOR FALLEN WIRE. — In such an action it was unnecessary to plead improper insulation, where the gist of the action was the negligence resulting in the wire falling into the street.
3. PROXIMATE CAUSE — NONINSULATION OF FALLEN WIRE. — The proximate cause of such an action is the negligence resulting in the falling of the wire and not the defective insulation.
4. DAMAGES — EVIDENCE — FUTURE EFFECTS. — It is proper to admit testimony concerning the probable future effects of such an injury and to allow the jury to take these into consideration in estimating damages.

Appeal by defendant from judgment for plaintiff in action for damages. *Affirmed.*

Opinion by HARRISON, J.:

On the 14th day of June, 1903 — a clear, bright day — Herbert Wesley Spratley, an infant seven years of age, in company

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Presumption of Negligence from Live Wires in Streets. — See notes to *Chaperone v. Portland General Electric Co.*, 8 Am. Electl. Cas. 468, 476; to *Railway Co. v. Cooper*, 7 Am. Electl. Cas. 444, 446; and to *Carr v. Electric Co.*, 7 Am. Electl. Cas. 746, 757.

Other cases in this volume holding that the presence of live wires in the street raises a presumption of negligence: *Augusta Ry. & Electric Co. v. Weekly, post* (horse shocked from wire in street); *O'Leary v. Glens Falls Gas and Electric Light Co., post* (permitting wire to remain in street several days); *Wolpers v. N. Y. & Queens Electric L. & P. Co., ante; Cleary v. St. Louis Transit Co., ante* (trolley wire down).

See generally, as to injuries to travelers from contact with live wires in the streets, note to *Spires v. Middlesex, etc., H. & P. Co., ante.*

with his little sister and their little companion, Mabel Blair, were en route to the cemetery in Berkley, a suburb of the city of Norfolk. While passing along Liberty street, Herbert was injured by coming in contact with a charged electric wire owned by the plaintiff in error, which had fallen across the sidewalk about two hours before the accident. He was playing with his sister, and thinking the wire was a switch, picked it up to hit her, with the result that he was severely shocked and burned about his head, hand, and leg, and was rendered unconscious. These injuries confined him to the bed for four weeks, and to the house for six weeks or more.

This suit was brought by the injured child, in the name of J. W. Spratley, as next friend, against the defendant company, to recover damages for the injuries mentioned; and, upon a demurrer to the evidence, judgment was rendered in favor of the plaintiff for the sum of $2,000, the amount ascertained by the verdict of the jury. A writ of error was awarded, which brings the case to this court for review or errors alleged to have been committed at the trial.

It is contended that the demurrer to the evidence should have been sustained, because the defendant company was not shown to have been guilty of negligence.

This is a clear case for the application of the common-sense rule of evidence expressed in such condition until the accident, without his fault. *Haynes v. Raleigh Gas Co.*, 5 Am. Electl. Cas. 264; *Western Union Tel. Co. v. State, for, etc.*, 6 Am. Electl. Cas. 210, 82 Md. 293, 33 Atl. 763, 31 L. R. A. 572, 51 Am. St. Rep. 464; *Willey v. Boston Elec. Co.*, 6 Am. Electl. Cas. 364, 168 Mass. 40, 46 N. E. 395, 37 L. R. A. 723; *Trenton Pass. R. Co. v. Cooper* (N. J. Err. & App.), 7 Am. Electl. Cas. 444, 37 Atl. 730, 38 L. R. A. 637, 64 Am. St. Rep. 592; *Richmond Ry., etc., Co. v. Hudgins*, 100 Va. 409, 41 S. E. 736.

The question and answer objected to were not essential to the plaintiff's case. His case was completely made out without it.

In *Morotock Ins. Co. v. Fostoria Novelty Co.*, 94 Va. 361, 26 S. E. 850, it is held that although a question asked the witness and his answer thereto are illegal and improper, yet, if the propounder's case has been completely made out without such question and answer, and the admission of the answer did not and

could not affect the result, it is harmless error, and the appellate court will not for this cause reverse the judgment of the lower court.

Further, the question and answer under consideration were without prejudice to the defendant company, because its own evidence tended just as strongly to show that the wire was not properly insulated.

In *Taylor v. Mallory,* 96 Va. 18, 30 S. E. 472, it is held that, although an exception to the testimony of a witness may be well taken, if the same fact is subsequently proved by other witnesses without objection the error will be deemed to be harmless. See also *Virginia & S. W. Ry. Co. v. Bailey,* 103 Vt. —, 49 S. E. 33.

The defendant further contends that its demurrer to the evidence should have been sustained because the proximate cause of the injury was the lack of insulation, and the declaration did not contain specific allegation that the wire was not insulated. In support of this contention the defendant company relies upon its witness T. F. Newberry, who testified that two colored women passing along the sidewalk were struck in the face by the wire, and flirted it out of the way without being injured. This witness also testified that he saw the little boy, while standing on the lot by the sidewalk, take hold of the wire, and that he grasped it at a point where it was not insulated. The witness further says that he thinks that he (the witness) took hold of the wire at a point where it was insulated without being hurt. The clear inference from this evidence introduced by the defendant is that the wire was not maintained as to its insulation; that the insulation was off at some points, and on at others; and consequently that the two colored women were not injured because they were struck by the wire at a point where it was insulated, while the child, as shown by the witness, grasped the wire at a point where it was not insulated. We see nothing in this evidence to establish the contention that the lack of insulation was the proximate cause of the accident. The want of insulation would have been harmless had not the wire fallen. It was the negligence of the defendant company in allowing the wire to fall and remain across the sidewalk, and not the lack of insulation, that was the proximate cause of the accident. Had not the wire fallen, it could have remained on the pole in the air, uninsulated, indefinitely, with-

out injury to any one. So that it was the falling of the wire that brought about the injury sustained by the plaintiff.

It is further contended by the plaintiff in error that the court below erred in allowing Dr. Lankford to testify as to the probable future effects of the injuries sustained by the plaintiff, and in not striking out evidence as to such future effects.

In Watson on Personal Injuries, § 604, p. 720, it is said:

"An exception to the rule excluding opinion evidence exists where it is desired to show by properly qualified experts the nature or extent of the plaintiff's injuries, and their probable permanency or the reverse. 'There is,' indeed. it has been said, 'no evidence other than that of experts by which courts and juries can determine whether a disease or an injury has or can be permanently cured, or what its effect will be upon the health and capability of the injured person in the future.' It is competent, therefore, for the physician who attended the plaintiff during the period of treatment for the injuries received to give his opinion as to the effect of the injuries received by the plaintiff upon his future condition, or to state from his experience and medical knowledge the probability of the recurrence of inflammation in an injured muscle. And a physician may also testify, in a general way, that there is a probability that certain conditions caused by the injuries, and shown to exist at the time of the trial, will produce still more serious results in the future, or may be requested to express his opinion as to the probable effect of the injuries on the plaintiff's general health, or may be asked whether, in his opinion, on the facts shown, if certain conditions exist two years after the accident, they will probably be permanent."

In *Toledo Ry. Co. v. Baddeley,* 54 Ill. 19, 5 Am. Rep. 71, it was held to be proper for qualified experts to testify as to the probable effect of the injuries received by the plaintiff upon his future condition.

been entailed upon him by the injuries and consequent disability were also to be considered.

In the light of these authorities, we are of opinion that there was no error in permitting the witness Dr. Lankford to testify as to the probable future effects likely to result from the injuries sustained by the plaintiff.

It is further asserted that the court erred in its instruction to the jury touching the measure of damages. The objection urged to this instruction is that it told the jury they should take into consideration, in addition to the expenses and pain and loss already incurred and suffered, such as would naturally, reasonably, and probably result to the plaintiff as a consequence of his injuries.

The objection made to this instruction has been practically disposed of by what has been said in dealing with the last-mentioned assignment of error, in regard to the introduction of expert evidence as to the probable future effects of the injuries sustained by the plaintiff.

In Watson on Personal Injuries, § 384, p. 478, the learned author, in discussing the propriety of an instruction embodying the element of damage here objected to, says:

"But it is not perceived why the probability or likelihood or reasonable expectation of the future suffering does not satisfy the rule of reasonable certainty, and such is believed to be the weight in the best considered cases. An instruction so worded, indeed, would seem to be preferable to one simply stating the requirement to be reasonable certainty, because in the former case the jury would be advised in some measure as to what constitutes reasonable certainty. It has been held, accordingly, that a jury may be properly instructed to give damages for such future suffering as the plaintiff will probably endure, or, 'in any reasonable probability will hereafter sustain.' And in an action for personal injuries, where proof of future effects with certainty was impossible, and reasonable probabilities were necessarily the basis of the medical opinions, it was held proper to charge that damages could be awarded for 'such consequences as are reasonably likely to ensue,' and all pain and suffering which the plaintiff, 'in reasonable probability, will hereafter sustain.' In the Supreme Court of Arkansas the following instruction was approved in an action for assault and battery: 'If the jury find for the plaintiff, it will be their duty to consider whether or not the plaintiff is likely to suffer in the future from the effects of the wound received at the hands of defendant; * * * and, if they find in the affirmative, it will be their duty to assess a sum equivalent to the injuries and sufferings, as they find from the evidence, he is likely to suffer in the future.'"

We are of opinion that in the case at bar the court committed no error in telling the jury that they could take into consideration,

in assessing damages, "such as will naturally, reasonably, and probably result to the plaintiff as a consequence of his injuries."

Mrs. Rosa Spratley, the mother of the plaintiff, introduced on his behalf, was asked, "Has any money been expended for medicine?" and answered, "I spent, I think, in the neighborhood of seven dollars. I don't know whether it was that much, or any more. I did not keep a strict account." It is contended in the oral argument before this court that the admission of this question and answer was error, for which the judgment should be reversed, because the plaintiff could not recover except for such expenses as he had himself incurred, whereas the answer showed that the mother had expended the sum mentioned.

If consideration of this question were not precluded by the maxim, "*De minimis non curat lex,*" the contention would not be tenable, in view of the instruction given, which expressly limits the consideration of the jury to such necessary expenses as the plaintiff himself incurred for medicine. But apart from these considerations, this question cannot be raised for the first time in oral argument before this court. No exception was taken to the evidence at the time the question was asked. No bill of exception was subsequently asked for on the subject, and there is no mention of such an assignment of error in the petition to this court for a writ of error. It is well settled that under such circumstances it is too late to now make the introduction of this evidence a ground for setting aside the verdict of the jury.

It is further assigned as error that the damages allowed by the verdict of the jury are excessive.

There is not a suggestion in the record that the jury were actuated by prejudice or partiality, and, therefore, upon well-settled principles, their verdict cannot be disturbed. *Norfolk & W. R. Co. v. Shott,* 92 Va. 34, 22 S. E. 811; *Richmond Ry. & Elec. Co. v. Garthright,* 92 Va. 627, 24 S. E. 267, 32 L. R. A. 220, 53 Am. St. Rep. 839. In the last-named case it is said, "No method has yet been devised, nor scales adjusted, by which to measure or weigh and value in money the degrees of pain and anguish of a suffering human being, nor ever likely to be;" that, unless the finding of the jury is so great as to furnish ground for believing that they were actuated by partiality or prejudice, the court should not, under the well-settled rule in this State, disturb the verdict.

Upon the whole case we are of opinion that the judgment complained of must be affirmed.

WINKLEMAN v. KANSAS CITY ELECTRIC CO.

Missouri — Kansas City Court of Appeals — Feb. 6, 1905.

110 Mo. App. 184, 85 S. W. 99.

1. INSULATION — DEGREE OF CARE. — The utmost degree of care should be used by electric companies both in insulating wires and in keeping them insulated.
2. INJURY FROM DEFECTIVE INSULATION — PRESUMPTION OF NEGLIGENCE. — The fact that a person was injured by contact with a wire is conclusive evidence that it was not perfectly insulated, and that the owner is guilty of negligence.
3. SAME — CONTRIBUTORY NEGLIGENCE. — A person injured by coming in contact with a defectively insulated wire cannot recover if he has been guilty of negligence contributing to the injury.
4. PETITION — ACTION FOR INJURIES. — In an action for injury received from defectively insulated wires, the petition, if sustained by evidence, is sufficient at common law, although a city ordinance has been pleaded.

Appeal by defendant from judgment in favor of plaintiff. *Affirmed.*

Boyle, Guthrie & Davison, for appellant.

I. N. Watson and *D. W. Brown,* for respondent.

Opinion by ELLISON, J.:

Plaintiff instituted his action against defendant for damages resulting to him by reason of coming in contact with one of defendant's electric wires. The judgment was for plaintiff in the trial court. It appears that plaintiff was on what is known as a swinging scaffold hung down beside the brick wall of a building, and was engaged, with a trowel and mortar, in repointing the wall. The defendant's wires were stretched on poles along near the wall, and were about twenty feet from the ground. Plaintiff came in contact with one of the wires, and received such a shock as to render him unconscious. He was also burned about the hand, arm, shoulder, and hip.

1. It is urged that the following instruction was erroneous in not restricting defendant's duty to use every "reasonable" precaution which was accessible, the point being that by omitting the word "reasonable" the court held defendant too strictly, viz.:

Insulation. — As to duty of electric company to insulate wires, and the degree of care to be used, see note to *Alexander v. Nanticoke Light Co., ante.*

"The court instructs the jury that if you find that at the time and place in question the plaintiff was in a place where his business required him to be, and where he had a right to be, and if the defendant knew, or by the exercise of ordinary care would have known, that persons were liable to come in contact with its wire or wires in the performance of their duties, if you find persons were liable to come in contact with said wire or wires in the performance of their duties, then it was its duty to use every precaution which was accessible to insulate its wire or wires at that point, and at all points where the plaintiff would have the right to go to attend to his business, and to use the utmost care to keep them so, and for personal injuries, if any, resulting from its failure in that regard, it is liable in damages."

There are various degrees of care required in different jurisdictions with reference to the various dangerous appliances and methods now in use. In some courts it is held, even as to such exceedingly dangerous appliances as electricity, that "ordinary care" or "reasonable care" is what is required, while in others an extraordinary degree of care is required — that is to say, something more than mere reasonable care. The case of *Geismann v. Missouri Electric Co.,* 8 Am. Electl. Cas. 569, 173 Mo. 654, 678, 73 S. W. 654, undoubtedly puts this State with the latter class, for it is there expressly said that the law requires more than keeping the wires reasonably safe. But in consideration of the extended discussion of the *Geismann Case,* and the conflicting views which counsel have taken of it, and the binding obligation on this court of what is there said, we will state our understanding of the rule there laid down. The particular part of the opinion discussed is the following paragraph: "It follows from these authorities [which the court had just reviewed] that it was defendant's duty, in the first place, to use every protection which was reasonably accessible to insulate its wires at the point

ordinarily dangerous, much less effort would be considered a reasonable effort than if the appliance was one of the most dangerous, deceptive, and destructive known. So, when the court said that every protection "reasonably accessible" must be used in the first place in protecting the wires, and the "utmost care should be used to keep them so," the two expressions should be taken to mean the same thing — a statement of the same matter in different words. For, considering the noiseless, hidden, and destructive power of electricity, a reasonable effort to control it is nothing short of the utmost effort — nothing less than the utmost would be a reasonable effort. That the court did not intend the word "reasonably" to mean anything different from the words "utmost care" is further evidenced by the fact that it had just quoted approvingly from *McLaughlin v. Louisville Electric Light Co.*, 6 Am. Electl. Cas. 255, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812, where it was laid down in express terms that those maintaining electric wires should have them so insulated that they would be, not reasonably, but absolutely, free from danger, and to that end should have had perfect insulation; and the fact that such character of insulation was very expensive or inconvenient was no excuse. We therefore hold it to be the duty of those who maintain such appliances to use the utmost care to thoroughly insulate the wires and to keep them so insulated.

2. Furthermore, the rule laid down in the *McLaughlin Case* by necessary implication conclusively assumes that, if an injury results from contact with the wire, the person in care of the wire has not had it, or has not kept it, perfectly insulated, and therefore that he has been negligent. In that case an instruction was asked by the plaintiff, reading that: "The injury to the plaintiff is conclusive proof of the defective insulation, and of the negligence of the defendant." And the court said, in effect, that, in view of what it had written, the instruction became unimportant. But in *Clements v. Light Co.*, 4 Am. Electl. Cas. 381, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348, the statement made in that instruction is expressly stated to be the law. The rule laid down in those cases is adopted by the Supreme Court in the *Geismann Case*. We therefore hold that the fact that plaintiff was hurt by his contact with the wire is conclusive evidence that it was not perfectly insulated, and that

therefore the utmost care had not been exercised, and that defendant was guilty of negligence. The authorities referred to assume that perfect insulation may be had, and that the utmost care will provide it and thereby make the wires safe. *Perham v. Portland Electric Co.,* 7 Am. Electl. Cas. 487, 33 Ore. 451, 477, 53 Pac. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730.

3. It was not said in the *Geismann Case,* and we of course do not say, that if the insulation of the wires was perfect and was kept so, on a sudden breaking or disrupting of the insulation by an unforeseen accident, such, for instance, as some heavy weight falling upon the wire, and an injury following before the owner could learn of it or repair the wire, liability would follow. But the cases referred to and the case at bar were not of that kind.

4. Notwithstanding the strict rule thus applied, there would be no liability where the complaining party has himself been guilty of negligence contributing to the injury. In the present case, the plaintiff was where he had a right to be, and the question of his negligence was fully submitted to the jury under proper instructions, and the evidence justified a finding in plaintiff's favor on that head.

5. It is suggested that the cause of action was grounded on a city ordinance; that the petition declared on the ordinance regulating electric wires, and that no ordinance was introduced in evidence. But notwithstanding the ordinance (with its terms and requirements) was pleaded, yet, rejecting such portions of the petition, there was a good action at common law remaining.

it appears that reasonable men would find, without any reasonable probability of differing in their views, either that the plaintiff knew and appreciated the danger, or that ordinarily prudent men, under the same circumstances, would readily acquire such knowledge and appreciation.

2. SAME — DUTY OF OWNER TO WARN CONTRACTOR'S SERVANT. — An employee of an independent contractor is an invitee of the owner of the premises, and the latter is bound to warn him of electric wires near a staging upon which the employee is working.

3. QUESTION FOR JURY. — In an action for injury caused by falling from a staging against a live wire, it is a question for the jury whether the plaintiff came in contact with the wire while he had entire control of his person, or whether he lost his balance and fell against them.

4. CONTRIBUTORY NEGLIGENCE. — In an action for injuries from a live wire direct affirmative evidence that the plaintiff was exercising due care is not necessary. It may be inferred from all the circumstances attending the accident, and from the lack of evidence indicating carelessness on his part.

5. INSTRUCTIONS TO JURY. — In an action by an employee of a contractor for injury received by falling against a live wire while working on a staging in the erection of a power house, it is error to instruct the jury that if the plaintiff came in contact with the wires as the result of a fall not due to the defendant's fault, the fall would be an independent, intervening cause of the accident, which would relieve the defendant of liability for the plaintiff's injuries, for it omits the necessary qualification that this legal result would not follow if the defendant knew or ought to have known that workmen on the staging, while in the exercise of due care, were liable to fall upon the wires.

6. SAME. — If the charge that the defendant was obliged to use all the means and appliances known to the business of transmitting electricity, so as to insure as far as possible the safety of people who are lawfully near to and likely to be exposed to the wires, was too broad, it was not reversible error, for the jury were instructed by other parts of the charge that the defendant was bound to take at least reasonable precautions.

Cause transferred from Superior Court on defendant's exceptions after verdict for plaintiff. *Judgment on verdict, and exceptions overruled.*

On January 8, 1903, the plaintiff was employed by one Frost, an independent contractor, upon the construction of a power house for the defendant, located upon the easterly side of Cocheco street in Dover. The brick walls of the building had been carried up about twenty feet from the ground at the northeast corner, and at that point an outside staging had been erected, which was about seventeen feet from the ground. The staging also extended around the building, and was five feet wide. Along the street side of the building the defendant maintained upon its land an electric light line, consisting of poles, wires, and cross-arms, which ran obliquely with the wall of the building, and was nearest the building at the northeast corner, at which point the distance in a straight line from the wall to the nearest electric wire was from five feet three and one-half inches to five feet five inches. There were two electric

light wires attached to a cross-arm upon a pole which stood some sixteen feet from the corner. These wires were on the side of the pole farthest from the power house, and were in a place about four feet above the floor of the staging. The distance between the wires was from ten to twelve inches. The staging post at the northeast corner extended above the floor of the staging, and was within two inches of the nearest electric light wire. The floor of the staging extended out to the post. There were other smaller wires strung below the electric light wires, and supported by the same poles. The morning of January 8, 1903, was cold and frosty. During the preceding night there had been a light fall of snow. The plaintiff began work that morning by sweeping the snow from the upper staging, and may have performed this work at the northeast corner. The snow and ice were not entirely removed, so that the staging was more or less slippery. After finishing this work he was directed to take boards which were to be handed up to him from the ground, and place them on the staging at the east end. This work was done at such places as he and his associates selected. The boards were passed up to him under the wires at a point on the street side of the staging near the corner. After he had carried away five or six boards he was returning for another, and had reached the corner of the building, some five and one-half feet from the corner of the staging. This, he testified, was the last thing he remembered until he regained consciousness in the hospital. His injuries were wholly the result of his hands coming in contact with the defendant's wires at the northeast corner of the staging, upon which there was an electric current of 3,120 volts. After contact with the wires he fell to the ground. The wires had been insulated, but at the time of the accident, and for quite a period before, the insulation was worn off, and near the corner of the staging the wires were bare in places. The accident happened at about half-past eight o'clock. A fellow workman of the plaintiff testified that just before the accident he was upon the staging, and saw the plaintiff standing very near the edge of the staging at the northeast corner, looking down, as though waiting for a board to be passed up. The witness then testified: "I came right from that way right straight down the run, and when I got to the foot of the run I saw him when he dropped to the ground." The run referred to was an inclined walk extending from the staging and along the side of it to the ground. The witness stated that it was in the neighborhood of five minutes after he saw the plaintiff standing at the corner before he saw him falling, and that he fell off the east end of the staging. Miss Arnott testified that she saw the accident; that "the first thing I saw was some one fall against the wires, throw out their arms, and then he fell to the ground;" that there was a blaze from the wires; that the man remained there a minute or two, and then fell to the ground; and that he fell off the easterly end near the corner, head first. On cross-examination she testified that she saw him falling before he touched the wires, and that he threw up his hands and then fell. Another witness testified that he saw the plaintiff hanging on the wires, with his feet down. There was no other direct evidence of how the accident happened. The plaintiff testified that before the accident he had seen the wires near the staging post; that he knew the wires were uncovered in places near the corner, and that a live wire was dangerous; that he could not tell by looking at the wires whether the current was on or not; that he did not *know whether* the current was on that morning or not, but understood the

wires were used for electric lighting purposes, and did not know they were dangerous at the time. The defendant offered no evidence, but submitted motions for a nonsuit and for a verdict in its favor, which were denied, subject to exception. The defendant also excepted to the refusal of the court to charge the jury according to its requests, and to parts of the charge as given.

James A. Edgerly, George E. Cochrane, Walter W. Scott, and *William S. Mathews,* for plaintiff.

Leslie P. Snow, John Kivel, and *Orville D. Baker,* for defendant.

Opinion by WALKER, J.:

One ground of defense is that the plaintiff assumed the danger of coming in contact with the defectively insulated wires, charged with a high voltage of electricity, while he was engaged in his work near the northeast corner of the building; that, if he did assume that danger as a matter of law, it is unnecessary, and perhaps illogical, to inquire whether the defendant was negligent in maintaining at that point at the time of the accident the wires so charged with electricity, or whether the plaintiff was in the exercise of due care. It may be conceded that if the plaintiff knew and appreciated the danger of his situation, or, in the absence of actual affirmative knowledge upon that subject, if the ordinarily prudent man would have had such knowledge, he cannot recover, however reprehensible the defendant's conduct may have been, and however careful he may have been under the circumstances. It is the general rule that every one who voluntarily takes a particular position assumes the risk of all danger incident to remaining there, of which he either knows, or would know if he used ordinary care. *Miner v. Railroad,* 153 Mass. 398, 26 N. E. 994. By this is only intended that he assumed the risk of all dangers of the situation that are apparent to his observation, for he does not assume a risk when for any reason he could not be expected to apprehend it. *Demars v. Company,* 67 N. H. 404, 406, 40 Atl. 902. The defendant claims that the principles of law thus expressed in general language are applicable to the facts of this case, and establish the proposition that the plaintiff vountarily and knowingly incurred the risk of coming in contact with the charged wires while working near them. In this view, the manner in which the accident occurred, or the degree of care exercised by either the defendant or by the plaintiff,

is immaterial. *Thomas v. Quartermaine,* 18 Q. B. Div. 685; *Fitzgerald v. Paper Co.,* 155 Mass. 155, 158, 29 N. E. 464, 31 Am. St. Rep. 537. In short, the doctrine invoked is the one often expressed or indicated by the maxim, "*Volenti non fit injuria.*" But when this defense is urged as a ground for a nonsuit or for a verdict for the defendant, as it is in this case, it must appear that reasonable men, acting as the triers of the fact, would find, without any reasonable probability of differing in their views, either that the plaintiff knew and appreciated the danger, or that ordinarily prudent men, under the same circumstances, would readily acquire such knowledge and appreciation. The fact of actual or constructive knowledge on the part of the plaintiff must appear, either directly or by necessary inference from the evidence and the uniform experience of men, before the court can order a nonsuit or direct a verdict upon this ground. And this result must follow after the evidence has received a construction most favorable to the plaintiff. *Hardy v. Railroad,* 68 N. H. 523, 536, 41 Atl. 179. The essential question, therefore, upon this branch of the case, is whether the evidence authorized the jury to find that the plaintiff did not assume the risk.

The plaintiff, who was about twenty years old, was an ordinary laborer about the building. He had had but little experience with the practical operation of electricity. It appeared that he had for a short time run a saw propelled by electricity for sawing wood, and that he had then been told not to touch the wires. He understood that the wires near where he was at work were used to

wires were used for any other purpose than that of furnishing light, or that the plaintiff had any reason to suppose that they served any other purpose. Nor can the court say that it is a general custom for electric lighting companies to keep their wires fully charged in the daytime, so that no prudent man could work near such wires in the daytime without knowing of and appreciating the fact that they might be charged. As a matter of fact, it does not appear that the defendant was in the habit of keeping the current on during the daytime, nor does it appear for what purpose it was on at the time of the accident. The plaintiff had no knowledge that the defendant was operating its line, or that there was any occasion for operating it, at 9 o'clock in the morning. He testified that he did not know that at that time it was dangerous. Whether a prudent man might be justified in believing that the current was not on, under the circumstances, is a question which may be open to reasonable doubt, and which therefore cannot be determined by the court.

But it is urged that the plaintiff knew that the current was liable to be on and that as he could not know as a fact whether it was, or not, without coming in contact with the wires, he is chargeable with knowledge that it was on. This amounts to saying that a person is charged with knowledge of a danger which may or may not exist, although the apparent probabilities are that it does not exist; that he acts at his peril when his movements are governed by what is probable rather than by what is possible. Some reasonable men in the plaintiff's situation might say it was very probable that the current would not be on at that hour, although there was a possibility that it might be. Other reasonable men might entertain the opposite view. To say, as a matter of law, that the plaintiff, under such circumstances, could only justify his conduct by adopting the absolutely safe course, would be to hold that reasonable men would never act in such a situation upon probable and reasonable deductions. It is certain, that, if the plaintiff had refused to work near the wires because there was a possibility that they were charged, he would not have been injured. The perfectly safe course was for him to keep away from the wires, but that does not prove that he is chargeable with knowledge of the dangerous condition of the wires, and appreciated the actual situation, or that he assumed the risk, if reasonable

men, acting upon the probabilities, might have concluded that the current was off. This presents a question of fact determinable by the jury. The plaintiff did not assume the risk as a matter of law, and it was therefore competent for the jury to find that he did not assume it as a matter of fact.

This result leads logically to the inquiry whether the defendant was guilty of a breach of its duty to the plaintiff at the time of the accident; that is, whether the evidence warranted the jury in finding that it was. If the plaintiff assumed the risk of coming in contact with the charged and uninsulated wires, the defendant was not culpably negligent, as to the plaintiff, in maintaining its wires in that condition of danger; otherwise it may have been. In considering this question, it is important to have a clear idea of the defendant's act, which is claimed, and which the jury may have found, constituted a breach of its legal duty to the plaintiff. The mere fact that the wires were in close proximity to the staging upon which the plaintiff was rightfully standing is liable to divert attention from the essential act on the defendant's part which is the basis of the plaintiff's case. The wires, when in a normal condition, or when not used for the transmission of electricity, were harmless. It was only when they were charged with a certain voltage of that imponderable, silent, and hidden force that the situation of one near them became perilous, and especially so when the insulation was imperfect. The alleged negligence of the defendant consisted in maintaining or sending or having upon the wires not properly insulated at the time of the accident a

But it is claimed that the defendant did not know, and is not chargeable with knowledge, that the contractor, who had the entire charge of constructing the building, would build an outside staging five feet in width, extending at the northeast corner to within two or three inches of its wires; that such an appliance in erecting such a building is unnecessary, since the men could work as well from an inside staging; that the premises it furnished to the contractor, or the work it authorized him to do, did not necessarily involve the danger of personal injury from an electric shock; that, if there was negligence in the way the work was being done, it was the negligence of the contractor, for which it is not liable. This argument seems to be based upon the assumption that, as a matter of law, if it was possible for the contractor to erect the building without the use of outside stagings, or without exposing the laborers to the liability of coming in contact with its wires, it is not liable in this action. There is no evidence of the terms of the contract. The case was tried upon the mutual understanding that the man who had charge of the work was an independent contractor. It does not appear that the defendant imposed any conditions upon him with reference to its electric line. But in general, whether a dangerous situation will arise as a matter of strict necessity, from the work which the contractor engages to do, is not the test by which to determine the landowner's liability therefor. The correct principle is that the landowner is responsible to invitees upon the premises who suffer injuries from a nuisance created on his land, when that result was reasonably to be apprehended from the usual and ordinary method of doing the work contracted for. In *Thomas v. Harrington,* 72 N. H. 45, 54 Atl. 285, 65 L. R. A. 742, the contractor agreed, among other things, to put in a water pipe to connect with a water main in the highway, and it was there said:

"That the parties had in mind the excavation of a ditch in the highway is not open to doubt, upon a reasonable construction of the contract. It was a necessary and anticipated part of the work which the defendants employed McFadden to do. * * * In such a case, one cannot avoid responsibility for the consequences naturally to be apprehended in the course of the performance of the work by employing another to do the work as an independent contractor."

If, upon a reasonable construction of the contract under which the defendant employed the contractor to build a brick block of

the character of the one actually in part constructed, the parties intended and understood that an outside staging five feet in width was to be built, the defendant has no ground for insisting that it did not authorize, as a reasonably necessary part of the work, the erection of such a staging. *Samuel v. Novak* (Md.), 58 Atl. 19. That an outside staging of that width is a convenient means employed in erecting a brick structure is a matter of common knowledge, which sufficiently justifies the inference that the defendant understood that it would be employed by its contractor in erecting its new power house. The fact of danger necessarily inherent in the work does not fix the limit of the employer's liability for resulting injuries; in other words, it affords no excuse for him to show that it was possible for the contractor to do the work in a safer manner, if the method adopted was contemplated by or known to him, upon a reasonable construction of the contract. *Norwalk Gaslight Co. v. Norwalk,* 63 Conn. 495, 526, 527, 28 Atl. 32; Cooley, Torts, 547. The fact that in this case it was possible to construct the walls of the power house without the aid of an outside staging, or to adopt some other arrangement that would prevent the laborers from getting in close proximity to the electric wires, does not alone absolve the defendant from liability, since it was competent for the jury to find that the use of an outside staging, five feet in width, around the building, was a reasonable and usual means for the construction of brick buildings, and that the defendant presumably understood such a staging would be used by its contractor, in the absence of any special con-

staging. Upon any view of the evidence, it was competent for the jury to find that it had such knowledge, and hence that it authorized the construction of the staging upon its premises, which, in connection with the wires, when charged, constituted a concealed danger to men working in that place. *Brannock v. Elmore,* 114 Mo. 55, 63, 21 S. W. 451.

The defendant's argument upon this point also proceeds upon the assumption that the contractor had full knowledge of the danger to be apprehended from constructing and using an outside staging at the northeast corner; and the conclusion of law is predicated upon it that the plaintiff's injury, if the legal result of any one's negligence, was alone due to the negligence of the contractor. If it is conceded that this assumption of fact is correct, it does not follow that the defendant owed no duty to the plaintiff with reference to the condition of the premises which it suffered to exist. The plaintiff was not a trespasser or a mere licensee in his relation to the defendant. He was not there upon his own business alone or for personal pleasure. He was there at the request of the defendant, and for the benefit and advantage of the defendant. *Plummer v. Dill,* 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463. The fact that he was a servant of the contractor in the performance of the work did not relieve the defendant from the performance of any duty it owed him as an invitee. There is no necesary inconsistency in holding that, with reference to the contractor, he was in a legal sense his servant, and with reference to the defendant he was its invitee. Presumably he was a reasonably intelligent and prudent man for the work he was employed to do. There is no evidence to the contrary. To say the least, he was such a man as the defendant authorized by the contract to come upon its premises for the purpose of working upon the staging. A simple warning to him of the concealed danger incident to his work near the charged wires would have doubtless prevented the accident. Whether, if he had been an imbecile, the defendant would have had the right, as against the contractor, to exclude him from the premises, is a question that need not now be considered. Perhaps in such a case it would be unreasonable to hold that he was the defendant's invitee.

"Roundly stated," the rule is "that the relation of master and servant does not subsist between the proprietor and the servant

of the contractor; and therefore those obligations which the law imposes upon the master for the protection of one injured while in his service do not rest upon the proprietor, but upon the contractor. On the other hand, the servant of the contractor must be deemed to be upon the premises of the proprietor by his invitation, express or implied; and therefore he owes him the same duty of guarding him against the consequences of hidden dangers on the premises that a proprietor would in any case owe to a guest, a customer, or other person coming by invitation upon his premises." Thomp. Neg., § 680. The same author also says (section 979):

"It is not necessary to suggest that, where a proprietor engages an independent contractor to do work upon his premises, the contractor, while executing the work, will be there in pursuance of the invitation of the proprietor, and the proprietor will * * * be under the duty of exercising ordinary or reasonable care to the end of promoting his safety. In almost every such case there is the further implication that if the contractor brings third persons, his own employees, his partners, or assistants, to assist him in executing the contract, such persons are presumably upon the premies by the invitation of the owner, and he owes to them the same measure of care, to the end of promoting their safety, that he owes to the contractor himself; and this, although no contractual relation exists between the proprietor and them."

See also *Coughtry v. Woolen Company,* 56 N. Y. 124, 15 Am. Rep. 387; *John Spry Lumber Co. v. Duggan,* 80 Ill. App. 394, 398; *Johnson v. Spear,* 76 Mich. 139, 143, 42 N. W. 1092, 15 Am. St. Rep. 298; *Brannock v. Elmore,* 114 Mo. 55, 21 S. W. 451; *Holmes v. Railway,* L. R. 4 Exch. 254; Beach, Cont. Neg., § 51.

If the defendant had actually employed the plaintiff to work upon the staging it authorized to be built around its building, in the absence of an assumption of the risk by the plaintiff it would have been its duty to exercise reasonable care in some way to protect him, while observing due care, from incurring the danger of coming in contact with the charged wires. But there is no sound reason why it is not under a similar legal obligation when the plaintiff is by implication its invitee instead of its servant. Being its invitee, the plaintiff had a right to rely upon the defendant's performance of this duty, and to assume that the defendant would not expose him, while attending to the work of constructing its building, to great and serious dangers connected with the prem-

ises, of which he had no knowledge, and of which he was not chargeable with knowledge, but which were well known to the defendant. "Every man who expressly or by implication invites others to come upon his premises assumes to all who accept the invitation the duty to warn them of any danger in coming, which he knows of or ought to know of, and of which they are not aware. This is a very just and very familiar principle." COOLEY, J., in *Samuelson v. Mining Co.,* 49 Mich. 164, 170, 13 N. W. 499, 43 Am. Rep. 456; *True v. Creamery,* 72 N. H. 154, 156, 55 Atl. 893; *Bright v. Barnett & Record Company,* 88 Wis. 299, 306, 60 N. W. 418, 26 L. R. A. 524; *Bennett v. Railroad,* 102 U. S. 577, 26 L. Ed. 235.

The assumed fact that the contractor knew of the peculiar danger connected with the plaintiff's situation is immaterial. The duty imposed by law upon the defendant, as the owner and occupier of the premises, for the reasonable protection of its invitee, is not performed by an attempted delegation of it to a third party. It is a nondelegable duty, arising from the proprietor's control of the premises (*Woodman v. Railroad,* 149 Mass. 335, 340, 21 N. E. 482, 483, 4 L. R. A. 213, 14 Am. St. Rep. 427); and, "where the duty sought to be enforced is one imposed by law upon the defendant, he cannot escape liability by showing that he employed another, over whom he had no control, to perform it for him." *Pittsfield, etc., Co. v. Shoe Co.,* 71 N. H. 522, 530, 53 Atl. 807, 809, 60 L. R. A. 116. "He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it." *Dalton v. Angus,* 6 App. Cas. 740, 829; *Rolfe v. Railroad,* 69 N. H. 476, 45 Atl. 251; *Cabot v. Kingman,* 166 Mass. 403, 406, 44 N. E. 344, 33 L. R. A. 45; *Engel v. Eureka Club,* 137 N. Y. 100, 104, 32 N. E. 1052, 33 Am. St. Rep. 692; 1 Shearm. & Red. Neg., § 176; Cooley, Torts, 547. Suppose the fact appeared that Frost knew at the time the contract was made that the defendant proposed to maintain upon the wires a dangerous current of electricity; upon what ground could it be held that the defendant was thereby absolved from its duty of care toward those whom it in effect invited to work upon its premises in close proximity to the point of danger? Or suppose Frost had agreed

with the defendant to warn his men of the danger, and had failed to do so; it is plain that that fact would afford the defendant no justification for its failure to perform its duty to the plaintiff. Frost's knowledge is immaterial upon the question of the defendant's performance of its duty to the plaintiff, as it would be if it owed him no duty.

It is said that the relation existing between the parties does not differ from that of a landlord and his tenant's guest or subtenant, where by the terms of the lease the tenant enters into full control of the premises. But if, in the absence of an express contract, the landlord is under no obligation to his tenant, or to one occupying the premises in the right of the tenant, to keep them in a proper sanitary condition (*Towne v. Thompson,* 68 N. H. 317, 44 Atl. 492, 46 L. R. A. 748), the attempted application of that principle to this case fails (1) because the defendant did not give the exclusive possession of the premises, including its line of wires, to the contractor, as to a tenant; and (2) because the plaintiff was present, not upon the invitation of the contractor alone, and for his benefit alone, but upon the implied invitation of the defendant, and in the prosecution of its special business. In short, the defendant's contract with Frost was not a contract of leasing, by which the latter acquired the exclusive possession of the premises, and hence the argument by analogy is clearly fallacious. See *Looney v. McLean,* 129 Mass. 33, 35, 37 Am. Rep. 295; *Learoyd v. Godfrey,* 138 Mass. 315; *Gordon v. Cummings,* 152 Mass. 513, 25 N. E. 978, 9 L. R. A. 640, 23 Am. St. Rep.

that case the defendant furnished the defective staging as an appliance to be used by the contractor's servants, while in this case the defendant furnished or maintained the premises in a dangerous condition, it is difficult to understand how that difference in the facts affects the legal principle involved. Whether the defendant furnishes the contractor with defective tools, or induces him to undertake the performance of the work in a dangerous place, the defendant's liability for resulting injuries to the contractor's servants — his invitees — does not depend on a question of mere terminology. The legal definition of his duty would be the same in both cases. See *Erickson v. Railroad,* 41 Minn. 500, 43 N. W. 332, 5 L. R. A. 786. The defendant's employment of Frost did not make the latter a tenant of the former, or render the plaintiff a trespasser or mere licensee as against the defendant. He was an invitee, and it owed to him the nondelegable duty of using reasonable care to protect him from the concealed danger occasioned by its maintaining upon its wires, near which it invited him to work, a high voltage of electricity. The jury were authorized to find from the evidence that it did not perform this duty.

It is further contended that, if the defendant was negligent in the manner above indicated, its negligence was not the proximate cause of the plaintiff's injury, because, according to the defendant's claim, the evidence shows that for some cause, not attributable to the defendant, the plaintiff was in the act of falling before his hands came in contact with the wires; and it is urged that this was an independent, intervening cause of the accident, without which the plaintiff would have sustained no injury, and hence that it was the proximate cause thereof. Whether, upon the facts as the defendant assumes them to be, this conclusion, as a matter of law, is sound, is at least open to doubt. But unless the evidence reported shows that the defendant's theory of the accident is necessarily true, it is unnecessary, upon the motion for a nonsuit, to discuss the correctness of the legal conclusion submitted. For some reason, perhaps due to the effect of the electrical shock, the plaintiff was not able to recall what he did or what occurred after he reached the corner of the building, some feet distant from the corner of the staging. That there was evidence tending to sustain the defendant's theory must be conceded,

but there was other evidence supporting the plaintiff's theory that he was attending to his proper work, and that accidentally his hands came in contact with the wires before he began to fall; in other words, that in seeking to free himself from the wires he fell backward and off the easterly end of the staging, instead of forward and off the northerly side of the staging, as claimed by the defendant. A fellow workman testified that he saw the plaintiff standing at the northeast corner of the staging, looking down, apparently waiting for a board to be handed up to him; that the witness went directly down the runway on the side of the staging, and when he reached the ground he saw the plaintiff falling off the easterly end of the staging, from the position he was occupying when he last saw him. It was competent for the jury to find that it did not take the witness more than a minute or two to reach the ground after he saw the plaintiff standing on the staging, although he said it was "in the neighborhood of five minutes." The distance he walked and the speed he made going "right straight down the run" might be more trustworthy evidence of the time it took him, than his opinion. Upon this evidence, and the fact that he was injured by the electrical current on the adjacent wires, it was competent for the jury to find that the plaintiff, immediately before and up to the time of the accident, was standing at the northeast corner of the staging, attending to his work. *Murray v. Railroad,* 72 N. H. 32, 40, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660. Miss Arnott, the only witness who saw him when his hands touched the wires, testified that the plaintiff was near the corner of the staging; that the first thing she saw "was some one fall against the wires, throw out their arms, and then fell to the ground"; that he fell off the east end of the staging; and that his feet were on the staging when he touched the wires. On cross-examination she testified that he began to fall before he touched the wires. If he had, his momentum would naturally have carried him off the northerly side of the staging forced the wires out, whereas there was evidence that the corner post of the staging was burned or scorched at the time of the accident, which fact had some tendency to prove that he pulled the wires toward him, and that he was not falling at that time. The act of drawing back from the point of contact would doubtless be a natural or instinctive movement to make under such

circumstances, if it was possible. In this connection, the fact that he fell off the east end of the staging, though very near the post, is significant. Upon this state of the evidence, it was competent for the jury to find that the plaintiff did not lose his balance and fall upon the wires, but that he came in contact with them while he had entire control of his person. The casual connection between the defendant's negligence and the plaintiff's injury, upon this view of the evidence, is clearly established, or at least there was evidence sustaining that theory, which was properly for the consideration of the jury.

It is further argued that the plaintiff was guilty of contributory negligence. But so far as this is based upon the assumption that he stumbled over the boards, or slipped on the ice or snow on the boards and fell onto the wires, it is sufficient to say that such is not a necessary inference from the evidence, and the plaintiff was not obliged to negative the imputation of contributory negligence based upon it. The fact that he chose this particular place for taking up the boards, which proved to be a dangerous place, when the work could have been safely done at other points on the staging, is merely evidence for the consideration of the jury upon the question of his care, in view of his actual or constructive knowledge of the situation. Nor is it correct to say that there was no evidence that the plaintiff was in the exercise of due care. It is well settled in cases of this character that direct, affirmative evidence that the plaintiff was exercising due care is not necessary. It may be inferred from all the circumstances attending the accident, and from the lack of evidence indicating carelessness on his part. *Lyman v. Railroad,* 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364; *Hutchins v. Macomber,* 68 N. H. 473, 44 Atl. 602; *Gahagan v. Railroad,* 70 N. H. 441, 50 Atl. 146, 55 L. R. A. 426. The evidence is consistent with the theory that the plaintiff, while engaged in performing his work, was exercising that degree of care which an ordinary prudent man might exercise under the same circumstances; that his injuries were proximately attributable to the negligent act of the defendant; and that he did not voluntarily take the risk of the danger he encountered. It follows that the defendant's motions for a nonsuit and for a verdict were properly denied.

Several exceptions were taken to the refusal of the court to in-

struct the jury as requested by the defendant. In some of the requests it was assumed, as a matter of law, that the defendant is not liable because it was the duty of the contractor to protect his men against the known dangers of the situation. But as it has already been shown, this is no defense.

Other requests are founded upon the proposition that if the work contracted to be done did not necessarily produce the danger — that is, if the contractor could have constructed the building without creating the dangerous situation that did exist — the defendant is not responsible. This position has already been considered and found to be untenable. It would also have been erroneous to instruct the jury, as in substance requested, that, if the plaintiff came in contact with the wires as the result of a fall not due to the defendant's fault, the fall would be an independent, intervening cause of the accident, which would relieve the defendant of liability for the plaintiff's injuries. This proposition omits the necessary qualification that this legal result would not follow if the defendant knew or ought to have known that workmen on the staging, while in the exercise of due care, were liable to fall upon the wires. It was competent for the jury to find that accidents of that character might reasonably be apprehended from the situation the men were in, and the character of the work they were doing. *Pittsfield, etc., Co. v. Shoe Co.,* 72 N. H. 546, 58 Atl. 242; *Ela v. Cable Co.,* 8 Am. Electl. Cas. 423, 71 N. H. 1, 51 Atl. 281. Whether the plaintiff's position at that time ought reasonably to be apprehended is, to say the least, under the evi-

The defendant took several exceptions to the charge, which need not be specifically considered, since the questions involved have been already considered, and the charge was in substantial accord with the law. If the defendant was not obliged, in the language of the charge, "to use all the means and appliances known to the business of transmitting electricity, so as to insure as far as possible the safety of the people who are lawfully near to and likely to be exposed to the wires," it was bound to take at least reasonable precautions to that end, as the jury were instructed in other parts of the charge. If, standing alone, this language is too broad as a definition of the defendant's duty, it was so far qualified by the other parts of the charge, which were obviously correct, as to prevent its misleading the jury. *Saucier v. Spinning Mills,* 72 N. H. 292, 56 Atl. 545; *Cohn v. Saidel,* 71 N. H. 558, 571, 53 Atl. 800; *Lord v. Lord,* 58 N. H. 7, 11, 42 Am. Rep. 565; *Cooper v. Railway,* 49 N. H. 209. In the preceding sentence the court said that it was the defendants' duty to "so guard and protect their wires as to make the place where the workmen were employed near them reasonably safe." And the same idea was expressed in the charge several times. It is clear that the jury must have had a correct idea upon this subject.

The exceptions taken to the evidence have not been argued, but it is believed they present no error.

Exceptions overruled. Judgment on the verdict.

PARSONS, C. J., and CHASE and BINGHAM, JJ., concurred.

YOUNG, J. (dissenting). In my view of the law, a contractor's servant cannot be permitted to maintain an action against the owner of the premises merely because he is such a servant, unless the contractor could have maintained the action if he had been injured instead of his servant; and no facts are shown in this case that make it an exception to this rule.

The doctrine of *respondeat superior* can have no application in this case, for the work of building this power house was not necessarily dangerous, but became so only because of the method the contractor employed to do the work (*Bailey v. Railroad,* 57 Vt. 252, 52 Am. Rep. 129); and the work which the contractor was employed to do was nothing the law made it the defendants' duty to do for the plaintiff's benefit (*Story v. Railroad,* 70 N. H.

364, 48 Atl. 288). So, if he can recover, it must be because the defendants, not the contractor, have failed to perform a duty imposed on them for the plaintiff's benefit. *Pittsfield, etc., Co. v. Shoe Co.,* 71 N. H. 522, 530, 53 Atl. 807, 60 L. R. A. 116. The first question, therefore, will be to inquire what duties the law imposes on a landowner for the benefit of others; and the second, whether there is any evidence from which it can be found that the defendants have failed to perform any duty the law imposed on them for the plaintiff's benefit.

The application of the elementary rule that it is the duty of every one to use ordinary care in the conduct of his lawful business to avoid injuring those with whom he either knows or ought to know his business will bring him in contact, makes it the duty of a landowner to use such care either to keep his premises in such condition that those whom he invites to visit him can do so in safety, or to notify them of all the dangers incident to making the visit, of which he knows and they are ignorant. Also, when he furnishes instrumentalities for the use of those with whom he has no contractual relations, it is his duty to use such care to notify them of any defects in the instrumentalities that make their use dangerous. *Gagnon v. Dana,* 69 N. H. 264, 266, 39 Atl. 982, 41 L. R. A. 389, 76 Am. St. Rep. 170. Also, when he employs an independent contractor to do work upon his premises, and retains control of the premises and a general supervision over the work, the law imposes the same duty on him for the benefit of the contractor's servants, in respect to the way he maintains his

the property owes them the same duties that the law imposes on him for the benefit of those who came upon his premises by his invitation. *Stone v. Railroad,* 51 Am. Dec. 200, note. Consequently, before the plaintiff can recover, there must be some evidence from which it can be found either (1) that the defendants invited him to come upon their premises; (2) that they provided for his use the instrumentalities whose defective condition caused his injury; (3) that they retained control over the work; or (4) that they and the contractor were in joint occupation of the premises where the plaintiff was injured.

Notwithstanding the defendants were the owners of the land on which the contractor was building their power house, there is no evidence from which it can be found that they were entitled to the possession at the time the plaintiff was injured. So it does not follow, as a matter of law, from the fact that he was rightfully there, that he was there by their invitation. If he were, it would be his duty to leave the premises when they directed him to do so; and, if he refused to go, they could maintain an action of trespass against him. It is obvious that, if he was there as the contractor's servant, they could neither drive him from their premises, nor maintain an action of trespass against him if he refused to leave when they directed him to do so, for the contractor had a right, by virtue of the contract he had made with the defendants, to bring as many men upon the premises as he thought were reasonably necessary to do the work that he had undertaken to do. So it would be an answer to such an action for the servant to show that he was there by the contractor's invitation.

The relation which exists between a person who employs an independent contractor to erect a building upon his land and the men the contractor employs to do the work are very similar to those which exist between a landlord and the family or servants of his tenant. The agreement that an independent contractor makes with his employer carries with it, by necessary implication, the right to take possession of so much of his employer's land as is reasonably necessary for the purpose of doing his work, and to retain it for a reasonable time, and also the right to bring with him all the men he thinks are necessary to complete his contract. Although the agreement that a tenant makes with his landlord usually describes the premises he is to occupy and the time he is

to occupy them with more or less accuracy, it does not always do so; but a tenant's agreement, like that which an independent contractor makes with his employer, carries with it, by necessary intendment, the right to bring as many men upon the leased premises as he thinks are necessary to enable him to use the premises profitably for the purpose for which they were leased. The contractor's servants do not come upon the premises where he is to do the work by his employer's invitation, any more than a tenant's servants come upon the leased premises by the owner's invitation. In both cases the owner of the premises has parted for a time with his right to their possession, and in both cases he knew when he did it that the person to whom he had given the right of possession intended to bring with him the men necessary to enable him to effect the purpose that induced him to take possession of the property; but, notwithstanding the owner knew this, he cannot be said to have invited either the servants of his contractor or his tenant to come upon his premises. The servants of both are rightfully there, because the right to the possession of the property carries with it, by necessary intendment, the right, to bring as many men upon the premises as are reasonably necessary to effect the purpose which induced either the contractor or tenant to take possession of the property. Consequently the right of their servants to be there does not depend upon the willingness or unwillingness of the owner, but upon the willingness or unwillingness of their employer, for he could, and the owner of the property could not drive them from the premises.

did. *Portsmouth Gaslight Co. v. Shanahan,* 65 N. H. 233, 19 Atl. 1002. If his contract would have authorized him to do what the plaintiff was doing when he was injured, they could not recover from the plaintiff; but, if it would not have authorized the contractor to do what the plaintiff was doing, then they could recover from the plaintiff for whatever damage he did to their wires.

Since the test to determine whether the defendants could maintain an action against the plaintiff for anything he did as the contractor's servant would be to inquire what rights the contract conferred on the contractor in respect to occupying the defendants' premises, the test to determine whether the plaintiff can maintain this action should be to inquire what duties that contract imposed on the defendants for the contractor's benefit. This is the converse of the first proposition, so, if that is sound, this must be.

There is another test which demonstrates the soundness of this proposition. That is the rule that a judgment on the merits in favor of one party to an action is a bar to an action by the other party to recover for an injury growing out of the same state of facts, for it is a rule of universal application that if A can recover from B in an action counting on B's failure to perform an imposed duty, B cannot recover from A for any injuries that he may have sustained in the same accident, caused by A's failure to perform some duties the law imposed on him for B's benefit. *Gregg v. Belting Company,* 69 N. H. 247, 46 Atl. 26. Consequently, if the defendants had recovered from the plaintiff for the injuries he did to their wires, the judgment in that action would be a bar to the maintenance of this suit.

The reason that a servant of the tenant is ever permitted to recover from the landlord is not because the law imposes any duty on the landlord for the benefit of his tenant's servants, but because the law imposes the duty of doing what the ordinary man does to enable his guests to visit him in safety — both upon the landlord for the benefit of his tenant, and upon the tenant for the benefit of his servants. Consequently, if the tenant's servant is injured by the tenant's failure to use such care, his servant can maintain an action against him to recover the damages he has sustained because of it; and the tenant can recover over from the landlord, if the landlord's fault was the legal cause of his failure

to use ordinary care to enable his servant to do his work in safety. *Gregg v. Belting Company,* 69 N. H. 247, 46 Atl. 26; *Boston & Maine R. R. v. Brackett,* 71 N. H. 494, 53 Atl. 304; *Boston & Maine R. R. v. Sargent,* 72 N. H. 455, 57 Atl. 688. The reason, therefore, that the tenant's servant is permitted to maintain an action against the landlord in the first instance, is not because the landlord has failed to perform any duty the law imposed on him for the servant's benefit, but to prevent circuity of action.

In short, the plaintiff was not using the staging at the time he was injured at the defendant's request; neither was he upon it in order to do their work. It was no more for the defendants' advantage to have the plaintiff use this staging in the way he was using it when he was injured, than it would have been to have him use the stairways in a factory they had leased to his employer. If he had used these, notwithstanding the defendants put them into the building to make it available for the purposes for which it was leased, and had been injured because of their defective condition, the test to determine whether he could recover from the defendants would be to inquire whether the contractor could have recovered if he had been injured, instead of the plaintiff. *Bowe v. Hunking,* 135 Mass. 380, 383, 46 Am. Rep. 471. Although it is true that the defendants knew when they employed the contractor to build their power house that he must bring his servants with him in order to do the work they had employed him to do, it cannot be said that this is evidence from which it could be found that the men the contractor employed to do the work, came upon

the defendants does not make the work of building it their work. If it does, whoever employs an independent contractor to build a ship or to make a pair of shoes is liable to the contractor's servants while they are engaged upon the work in the same way and to the same extent as though they were his servants, notwithstanding he can have no choice in their selection, or in the selection of the instrumentalities employed in doing the work. When the contractor completed the building, and the defendants paid him for it, the building would be theirs, and not before. Pub. St. 1901, c. 141, § 10. In the same way the ship or shoes would become his property, and in the same way, when a tenant makes his rent out of the work he does in his tenement and pays it to his landlord, it becomes his landlord's money. In one case the owner invites the contractor to come upon his premises, and in the other he invites his tenant, and he does this in both cases because he expects to receive some benefit from their coming. So there is no logical reason for saying that he invites the servants of an independent contractor to visit him, and that he does not invite the servants of his tenant to come upon his premises. As a matter of fact, an employer does not invite the contractor's servants to come upon his premises, neither does a landlord ordinarily invite his tenant's servants, although in both cases the owners of the premises know that the person they have invited intends to bring his servants with him, and are willing that he should do so. In both cases they expect to receive some advantage from his coming, and in both his servants are rightfully there, not because the owners have invited them to be there, but because their employer had a right, under his contract, to bring them there, and brought them there in the exercise of that right.

There is no claim in this case that the defendants provided any instrumentalities to be used in the construction of the building, which was held in *Mulchey v. Society,* 125 Mass. 487; *Coughtry v. Woolen Company,* 56 N. Y. 124, 15 Am. Rep. 387; *John Spry Lumber Co. v. Duggan,* 80 Ill. App. 394; *Johnson v. Spear,* 76 Mich. 139, 143, 42 N. W. 1092, 15 Am. St. Rep. 298; and *Bright v. Barnett & Record Company,* 88 Wis. 299, 60 N. W. 418, 26 L. R. A. 524 — to impose on the employer, for the benefit of the contractor's servants, the duty of using ordinary care to see that the "instrumentalities" were suitable for the purpose for which

they were provided. These cases do not hold that the employer owes an independent contractor's servants the same duty he owes to those who come upon his premises by his invitation, but that, if he furnishes instrumentalities for the use of the contractor's servants, he owes them the same duties in respect to such instrumentalities that the law would impose on him for the benefit of his own servants.

Neither is there any claim that the defendants retained any control over the work, which has been held in several cases (*Samuelson v. Mining Company,* 49 Mich. 164, 13 N. W. 499, 43 Am. Rep. 456) to impose the same duties on the employer for the benefit of the contractor's servants that it would impose on him for the benefit of his own servants, or any one else that he invited to visit him.

Neither is there any valid foundation for the claim that the defendants and the contractor were in joint occupation of the premises. There is no evidence as to the terms of the contract. So it cannot be inferred that they intended for the contractor to occupy any more of their premises than was necessary to enable him to do the work he had agreed to do, conveniently, economically, and without interfering unnecessarily with that part of the premises they occupied for other purposes. Neither can it be said that they intended for the contractor to build his staging in the way he did, if it was negligence for him to do so. In the absence of all evidence, there is a presumption that a man will use ordinary care. So, in the absence of all evidence on this question, it must be presumed that the defendants did not expect him to build a staging near these wires, unless the ordinary man would have done it. Although it may be a matter of common knowledge that men use outside staging in erecting brick blocks when they can do so in safety, it is not a matter of common knowledge that ordinary men are accustomed to use such stagings when it is negligence to do so. It would be a confusion of terms to say that ordinary men are accustomed to what it is negligence to do, for that would be only another way of saying that the ordinary man is accustomed to do what the ordinary man would not have done. There is no evidence from which it could be found that the contractor did not have the exclusive occupation of all the land necessary to enable him to erect the defendants' power house

conveniently and economically, for there is no evidence from which it can be found that it was reasonably necessary for him to build a staging where it was possible for his workmen to come in contact with the defendants' wires, or that the defendants ought to have anticipated that he would do so when they employed him to do the work, unless it can be found that they ought to have anticipated it from the mere fact that it was possible for him to do so. It is obvious that there is no presumption that they intended him to do that which it was his duty not to do.

It cannot be found that the defendants were occupying that part of their premises on which the plaintiff was at work when he was injured, jointly with the contractor, from the fact that there was no evidence as to what part of the defendants' premises the contract contemplated should be set apart for the contractor's use, for not only is there no presumption that the defendants intended that the contractor should use that part of their premises unless it was reasonably necessary for him to do so, or build such a staging as he built if it was negligence to do so, but there is a presumption, when a person fails to introduce evidence in respect to the situation at the time he was injured which is apparently within his reach, that he does not do it because he knows that, if he does, it will tend to prove he has no case. *Mitchell v. Railroad,* 68 N. H. 96, 34 Atl. 674. Although there is a presumption, in the absence of all evidence, that a person was exercising ordinary care at the time he was injured (*Tucker v. Railroad,* 73 N. H. 132, 59 Atl. 943; *Gahagan v. Railroad,* 70 N. H. 441, 451, 50 Atl. 146, 55 L. R. A. 426; *Smith v. Railroad,* 70 N. H. 53, 47 Atl. 290, 85 Am. St. Rep. 596; *Lyman v. Railroad,* 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364; *Huntress v. Railroad,* 66 N. H. 185, 34 Atl. 154, 49 Am. St. Rep. 600), this is not because the absence of evidence is evidence that the person who relies on it was exercising ordinary care, but because there is a presumption in any given case that a person was exercising such care, from the fact that it was his duty to do so, for it is a matter of common knowledge that the ordinary man ordinarily does that which it is his duty to do. It is apparent that the plaintiff could have put in evidence the contract between the contractor and the defendants, and the legitimate conclusion from his failure to do so is that the contract would show that the contractor had no right

under it to do what the plaintiff was doing at the time he was injured. So, instead of no evidence being evidence in his favor, when it appears that the person who relies on it has failed to introduce evidence in respect to the matter which is within his control, his failure to produce it tends to prove that the facts are not what he claims they are, for it is a matter of common knowledge that a person ordinarily introduces all the evidence within his control which has any tendency to sustain his position.

The fact that these wires had been moved also tends to negative the idea that the defendants intended to occupy any part of their premises in connection with the contractor, and the fact that he built his staging where he did is at least as consistent with the theory that he built it in that place by the defendants' permission as it is with the theory that he had a right to build it there. Consequently it cannot be found from that evidence alone that the contract he made with the defendants authorized him to build it where he did (*Deschenes v. Railroad,* 69 N. H. 285, 46 Atl. 467; *Spead v. Tomlinson,* 73 N. H. 46, 59 Atl. 376); and it is obvious that, if he was a mere licensee in respect to maintaining this staging, there was no such joint occupation of the premises as would impose a duty on the defendants for the benefit of the contractor's servants.

The burden of proof was on the plaintiff to establish every fact essential to his right to recover. This would include showing that the contractor had a right, under his contract, to occupy a part of the defendants' premises jointly with them, if he (the plain-

men were on their premises, or to see that each man he employed knew of and appreciated the risk incident to coming in contact with these wires. For, if it is not enough, to avoid liability, to notify the person who is employed to do the work of all the dangers incident to doing it, of which the employer knows and of which the contractor is ignorant, as was done in this case, then any one who employs an independent contractor to do work, the doing of which is necessarily dangerous, or which may become dangerous from the way in which the contractor does it, is liable not only for his own negligence, but also for the negligence of the contractor, if he could have anticipated that the contractor might be negligent. If the servants of such a contractor come upon the owner's premises by invitation, he owes them the same duties that the law imposes on him for the benefit of his own servants, or of others whom he invites to come upon his premises, notwithstanding he can have nothing to do with their selection, and cannot remove them from his premises except for a cause that would authorize him to remove the contractor; and this, no matter how ignorant or incompetent they may be. To illustrate: If a person should employ an independent contractor to take down coping that had become so rotten that it was liable to fall upon those who undertake to remove it, he must not only notify the person he employs to do the work of all the dangers incident to doing it, of which he knows and of which his contractor is ignorant, but he must also see that every man the contractor employs about the work is informed of all the dangers incident to doing it, and that he fully appreciates the risk incident thereto, or answer in damages if he is injured because of a danger incident to doing the work of which he was not informed, notwithstanding the owner was particular to notify the contractor of risk incident to this particular defect. If the contractor employs servants who are incapable of appreciating the risk incident to doing the work which the contractor was employed to do, on account of their youth or mental condition, there would seem to be no way in which the owner could escape liability, for it is obvious that he could neither discharge them, nor prevent the contractor from employing them, nor remove them from his premises without the contractor's consent, and merely telling them of the danger would not excuse him if they were incapable of appreciating the risk incident to doing

the work. On the other hand, he would be liable to the contractor if he interfered with his servants, and hindered or prevented them from doing the work that he had employed them to do. In other words, if a person who employs an independent contractor permits the contractor's servants to do the work, he is liable to them for the injuries they may receive, notwithstanding they could not have been injured but for the contractor's negligence in doing that which his contract did not contemplate he should do, unless such a contract contemplates that the contractor will do everything it is possible for him to do; and, if he prevents them from doing the work, he is liable to the contractor for any damages that he may sustain by reason of it.

If the contractor was lawfully in possession of the land covered by the building and stagings, and the defendants of that on which their poles were set and over which their wires were strung — or, in other words, if they were adjoining proprietors, with the division line midway between the nearest wire and the outside of the staging — and if it is conceded that a landowner owes a common-law duty to an adjoining proprietor in respect to the structures on his premises, the verdict should have been set aside.

If the defendants did not do all that the ordinary man would have done to enable the contractor and his servants to do their work in safety, when they notified him of the danger of coming in contact with their wires, still the only duty they owed the plaintiff was that of using ordinary care to enable him to do his work in safety; and the jury must have understood from the instructions which were given them, subject to the defendants' exceptions, that, in order to exercise such care, the defendants must "use all the means and appliances known to the business of transmitting electricity, so as to insure as far as possible the" plaintiff's safety, for, after instructing the jury, in substance, that it was the duty of the defendants to use ordinary care to enable the plaintiff to do his work in safety, the court proceeded as follows:

"To apply the principle of law I have stated to you, and which I have tried to illustrate, to the present case, I instruct you that, * * * when a person or a corporation engages in the business of transmitting electricity in high voltage — a voltage so high as to be dangerous to the lives and limbs of the persons who may come in contact with them while in the exercise of ordinary care — it is the duty of such a person to use all the means and appliances known to the business of transmitting electricity, so as to insure, as far

as possible, the safety of people who are lawfully near to, and likely to be exposed to, the wires."

It cannot be said, as a matter of law, that the jury were not prejudiced by these instructions, for it is conceded that they were erroneous. Neither can it fairly be found as a fact that the defendants were not prejudiced by them, from any evidence in the case, even if this court could pass upon that question, without overruling *Bullard v. Railroad,* 64 N. H. 27, 5 Atl. 838, 10 Am. St. Rep. 367, and all the cases that follow it. For this is not a case where the plaintiff tripped over an obstruction on his own land and fell upon the defendants' wires, but where he carelessly came in contact with them. If the defendants owed him any duty in respect to protecting him from such an injury, it could only be that of notifying him of the danger of coming in contact with their wires. So the question for the jury in this case (if the plaintiff was entitled to go to the jury) was not whether the defendants used every appliance known to electrical science to protect the plaintiff from injury, but whether they did all the ordinary man would have done when they notified his employer of the danger.

MEMPHIS CONSOLIDATED GAS & ELECTRIC CO. v. LETSON.

C. C. A. — Sixth Circuit — Feb. 8, 1905.

135 Fed. 969.

1. ELECTRIC LIGHT COMPANY — INJURY TO CUSTOMER — RES IPSA LOQUITUR. — A company which, for purposes of gain, creates or carries a deadly current, must take care of it, and if an excessive current enters a house by a "cross" between the primary and secondary wires, and kills a customer while turning on the light, there being no fault on his part, negligence is presumed.
2. SAME — CONTRIBUTORY NEGLIGENCE. — Plaintiff injured by a shock from an electric light is not guilty of contributory negligence because he used a certain kind of cord where it appears that the nature of the fixtures had nothing to do with the accident.
3. DEATH — DAMAGES — EVIDENCE OF EARNING CAPACITY. — Evidence that deceased was a "good provider" and was in the habit of spending on his

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Shock from Incandescent Lights. — See *Peters v. Lynchburg, etc., Light Co., post,* and note thereunder collating the cases in this volume.

family between $2,000 and $2,500 per year is admissible in the absence of better proof of earning capacity.

4. SAME — INSTRUCTIONS. — In an action for death caused by shock received from an electric light, *held* that the court in instructing the jury as to the elements of damage kept well within the rules and fairly set forth the elements to be considered.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

E. E. Wright, for plaintiff in error.

Bell, Terry & Bell, for defendant in error.

Before LURTON, SEVERNS, and RICHARDS, Circuit Judges.

Opinion by RICHARDS, Circuit Judge:

On May 19, 1903, J. J. Letson, a resident of Memphis, Tenn., was instantly killed by an electric shock received while turning on a 16 candle power incandescent lamp in the basement of his house. The lamp was a portable one, being attached to a cord. The deceased had been, since September 7, 1901, a patron of the Memphis Consolidated Gas & Electric Company, which had contracted to furnish him, for illuminating purposes, with a current of 104 volts to supply twenty 16 candle power incandescent lamps. Such a current is not regarded as dangerous to human life. Under the method in use, this harmless current was obtained by passing the initial dangerous current of approximately 2,300 volts from the primary wire into a transformer located on a pole in the street near Mr. Letson's house, where it was reduced to 104 volts

shocked and slightly burned. The suit was brought under the Tennessee statute by the widow, on behalf of herself and infant son. The electric company was charged with negligence in permitting the deadly current to pass into the residence of the deceased. The jury returned a verdict for $13,750. We shall consider such of the assignments of error as seem material. They may be grouped under three heads: First, those relating to the charge of negligence, and the nature of the proof required to sustain it; second, those growing out of the defense of contributory negligence; and, third, those concerning the measure of damages.

1. The declaration charged the defendant in three counts with negligence in permitting a dangerous and deadly current of electricity to pass into the house of the plaintiff's intestate: First, by negligently installing its wires (in connection with the transformer) and defectively insulating them, so that the primary and secondary wires were permitted to come into contact; second, by so negligently conducting its electric light plant as to permit such current to so pass; and, third, by so negligently conducting itself that, by means of defective wiring, insulation, and apparatus, it permitted such current to so pass. The defendant denied any negligence, averring that the accident was due to the negligence of the plaintiff's intestate. The testimony of the plaintiff conclusively showed that the cause of the accident was the contact or "cross" between the primary and secondary wires, and tended to show that this was due to the defective installation of the transformer, the wires being improperly located with reference to one another, and one left so loose that it naturally crossed the other. The defendant attempted to meet this by showing it had installed the transformer in the usual and proper way, that used by other electric light companies and regarded by experts as safe; but here it stopped. Conceding that the "cross" existed, it made no effort to explain how it happened, or to show that some cause for which it was not responsible had brought about the contact. Obviously, the "cross" was in itself a negligent condition of the wires, because it exposed customers within reach to the risk of serious, and probably fatal, injury. Such being the nature of the testimony, the court charged the jury as follows:

"You may also and you should look at the fact that the accident occurred, the fact that the wires confessedly did come together, and cause this acci-

dent, as the fact and circumstances in this case in determining whether there was any negligence. It is not sufficient in itself — Well, I don't say that — It is for you to say whether or not, from the nature and character of this accident, from the nature and character of these structures, from the condition and circumstances that surrounded the particular cause of happening of the accident, was, of itself, sufficient to infer negligence in the original structure. It may or may not. It is a question for the jury to determine, and you are to look at the happening of the accident as a fact in the case, just as you look at all the other facts, the opinion of the expert witnesses, the description of the structure by the people who made it, the description as it was found at the time of the accident and immediately afterwards, and you are to take the fact that the accident did happen, along with all the other facts and circumstances, and say whether or not it is a proper and reasonable inference to draw from the accident itself that it was negligently constructed, or whether the accident was of such a character that the contact might have taken place without any negligence in the original construction and maintenance of the wire.

"Now, I am going to illustrate that point to you by telling you of an experience of my own in relation to this question. I was sitting on the same bench in the trial of a case with Mr. Justice Brown, now of the Supreme Court of the United States, when he was a district judge, and the question came up as to when a jury, or a trier of the facts, or a court, in submitting a question to the jury, would be forced to infer from the accident itself that there had been negligence, and illustration was made of two railroad trains upon a single track coming into collision. I made the suggestion that that was of itself conclusive evidence of the fact that there was negligence somewhere for which the company was liable to the passengers; that two trains could not come into collision on the track of a railroad company without negligence on the part of the company somewhere, no matter whether we know where it was or not. Mr. Justice Brown said he did not agree to that, because he said some third party might come and throw a switch in such a way that the company would not be liable for it. That is one way it might happen. There might be such a structure of the grades that a train might get away without negligence on the part of the company, and might run away and go

was in this particular case such circumstances as would relieve the accident of the inference that you would otherwise draw about the negligence. I don't mean that the burden of proof is on the defendant company to show that it was guiltless of negligence; that is not what I mean. The burden is on the plaintiff to show that it was guilty of negligence; but you, in determining this question, as to how much importance you are to attach to the accident itself as proof of the negligence, you are to look at whether or not the facts and circumstances of the case have shown anything to indicate that the accident could have happened without negligence; for instance, if a great storm had been shown, a cyclone, or a wind blowing that had disarranged these wires, that had disarranged the cross-arms, that had brought the poles and structures together through some violent, through some extraordinary and unusual, wind and storm, and things like that. If that was indicated in this proof, you would be justified in saying that the happening of the accident didn't indicate it."

The charge is criticised, first, because it applies the rule of *res ipsa loquitur,* and, second, because it does not, but leaves the jury free to do as it sees fit — apply the rule or not. It is urged that the rule is not applicable, but if it is, the court must say so, and not leave the matter to the jury. This criticism does not appeal to us. We think the court dealt generously with the defendant. No rigid rule of presumptive guilt was applied, but after the inferences naturally to be drawn from certain facts had been explained, the jury was left free to determine, from all the circumstances of the case, whether the defendant had been guilty of negligence or not. This was not a case where the court was obliged to say whether, from the mere fact of the accident, negligence should be presumed. In *Kearney v. London, etc., Ry. Co.,* L. R. 6 Q. B. 759, it was held that negligence might be inferred from the fact that a brick fell from the pier of a railroad bridge without any assignable cause. The brick struck and injured the plaintiff, who was passing along a highway underneath the bridge. This presumption was based upon the duty of the railroad company to keep the bridge in repair, and to inspect it from time to time to ascertain whether the brick work was secure. But, in the present case, the cause of the "fall of the brick" is shown. It was the "cross" between the wires that sent the deadly current into the house. The wires were out of repair. The contention of the company amounts to this: that if the wires were properly installed it cannot be held responsible for their being out of repair, unless it is proved they got out of repair through its fault. But this loses sight of the duty of the company not only to make

the wires safe at the start, but to keep them so. They must not only be put in order, but kept in order. The obligation is a continuing one. The safety of patrons and public permits no intermission. Constant oversight and repair are required and must be furnished. Customers who contract for a harmless current to light their houses are entitled to rely on such inspection and repair as will effectually guard them against a dangerous current. They cannot guard themselves. Any attempt to do so would expose them to immediate peril. They must take and use the current on trust, relying upon the protection of the company. In view of this, when a deadly current enters a customer's house and kills him, it is not too much to call upon the company to explain the existence of the defect which caused the tragedy. If attributable to some force which the company could not foresee and guard against, it should not be held culpable. But an unexplained defect is a blamable one. A company which, for purposes of gain, creates or carries a deadly current, must take care of it, and if it gets away because the wires are out of order, and enters a residence and kills a customer without any fault on his part, negligence is presumed, and the company is bound to exculpate itself. *Griffin v. United Electric Light Co.*, 6 Am. Electl. Cas. 252, 164 Mass. 492, 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477; *Clarke v. Nassau Electric R. Co.* (Sup.), 6 Am. Electl. Cas. 234, 41 N. Y. Supp. 78; *Dwyer v. Buffalo General Electric Co.* (Sup.), 7 Am. Electl. Cas. 456, 46 N. Y. Supp. 874; *Wolpers v. Electric Light & Power Co.* (Sup.), 9 Am. Electl. Cas. —, 86

6 Am. Electl. Cas. 255, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812; *City of Owensboro v. Knox's Adm'r,* 76 S. W. 191, 25 Ky. Law Rep. 680; *Gilbert v. Duluth General Electric Co.* (Minn. 1904), 9 Am. Electl. Cas. —, 100 N. W. 653; *Newark Electric Light & Power Co. v. Garden,* 6 Am. Electl. Cas. 275, 78 Fed. 74, 23 C. C. A. 649, 37 L. R. A. 725; *May v. Burdette,* 9 Q. B. R. 101; *Fletcher v. Rylands,* L. R. 1 Ex. 265, 279; *Scott v. Docks Co.,* 3 Hurl. & C. 596; *Kearney v. London, etc., Ry. Co.,* L. R. 6 Q. B. 759, 762.

2. The defendant contended that the plaintiff's intestate was guilty of contributory negligence in using, in connection with the portable lamp which he was turning on when killed, a cord such as is ordinarily used in residences for pendent lights, and which had not been inspected before the current was turned on. The current was turned on September 7, 1901, and the accident occurred May 19, 1903. The inspection of fixtures was made by one Cleary. The testimony was conflicting upon the point whether this portable light was inspected or not, and the court submitted the question to the jury. Cleary testified, under objection, that the kind of cord used on this lamp was in common use in Memphis for that purpose. It was conceded that it would carry safely a current of 104 volts, which was all that was contracted for, and, anyhow, the testimony was all to the effect that such a current was harmless to human life. The proof also made it clear that, no matter what kind of cord had been used, the current of 2,300 volts would have been fatal to Mr. Letson when he grasped the lamp the way he did and turned on the light. In view of this, the action of the court relied on for reversal (if it was erroneous, which it is unnecessary to determine) could have had no effect upon the verdict, and hence was harmless.

In *Denver Electric Co. v. Lawrence,* 8 Am. Electl. Cas. 617, 31 Colo. 301, 73 Pac. 39, a young man, while turning on an incandescent light in his father's house, received a shock which seriously injured him. This resulted from a defect in the transformer, whereby a dangerous current was carried into the house. Respecting the effort of the company to show that the plaintiff turned on the light improperly, and thus by his negligence contributed to his injury, the court said (page 307, 31 Colo., page 39, 73 Pac.):

"The fact that the interior fixtures may have been out of repair cannot relieve the company of the responsibility it owes to the public, and owed to the plaintiff, to not permit a deadly current of electricity to enter the house, if within its power to prevent."

In *Gilbert v. Duluth General Electric Co.* (Minn. 1904), 9 Am. Electl. Cas. —, 100 N. W. 653, the plaintiff's intestate was killed while turning on an electric light in his bathroom. His death was caused by an excessive current which entered the house by a "cross" between the primary and secondary wires, so the case was similar to that before us. Respecting the contention that the house fixtures were defective, and therefore the deceased was guilty of contributory negligence, the court said:

"We are of the opinion this contention cannot be sustained. House fixtures are not constructed with a view of connecting wires with death-dealing currents. It appears from the record secondary wires ordinarily carry a voltage of but 100, or one-fifth the amount of a deadly current, and one twenty-second part of the voltage which the evidence tends to show passed over the wire in question and through the body of the deceased. The deceased was not an electrical expert, and, unlike appellant, he was not engaged in a business which charged him with special knowledge in the premises. We cannot say he was guilty of negligence in not anticipating that primary and secondary wires might become crossed in the streets, and that it was his duty to take precautions to guard against danger therefrom."

Under the charge, which it is unnecessary to quote, the jury may have found either that the cord had been inspected and approved, or, if not, that it would have made no difference whether it or another kind of cord was in use; in other words, that the nature of the fixture had nothing to do with the accident; that the deadly current would have killed Mr. Letson when he came in contact with the brass cap of the lamp, no matter what kind of cord was attached.

3. The remaining assignments relate to the testimony admitted and the charge given respecting the measure of damages. The deceased was a contractor, thirty-nine years old, of good habits, industrious, devoted to his family, and what is called a "good provider." He left a widow, and a son about nine years old. No witness was introduced who was able to state just what his income was, but testimony was admitted tending to show his occupation, his industry, and his mode of life, from which it appears that he was in the habit of spending on his family between $2,000 and $2,500 a year. It is urged this was error, but we do not think so.

The testimony was admitted in default of better proof of his earning capacity. If a man's income is limited to his earnings, if he spends only what he earns, then, when you show what he spends, you furnish data for estimating what he earns, and that was what was done, and the best that could be done, in this case.

Many exceptions were taken to the charge of the court. It was not brief, neither is counsel's criticism. We have carefully read and considered both. It seems that the Supreme Court of Tennessee has not always been consistent in its construction of the statutes regulating actions of this kind. From time to time it has modified and altered its views; so it was deemed necessary, in the recent case of *Davidson v. Severson,* 109 Tenn. 572, 72 S. W. 967, to review elaborately its many decisions, for the purpose of ascertaining and stating clearly and concisely what the law now is. Counsel agree that the court below differed from both of them in a view he expressed of the nature of the action, but counsel for the plaintiff below insists the error was favorable to the defendant. We agree to this. It is unnecessary to repeat all that was said generally on the subject of damages. The material inquiry is whether the court laid down the right rules for the guidance of the jury, correctly stating the elements of damage to be considered. We think the charge, taken as a whole, stated the law properly, with entire fairness to the defendant. Portions which, detached from the context, might seem to be misleading, are qualified or corrected by what succeeds. Thus, early in the charge, the court made a quotation from the case of *Baltimore & Potomac Railroad Co. v. Mackey,* 157 U. S. 72, 93, 15 Sup. Ct. 491, 39 L. Ed. 624, which the defendant below insists amounted to an instruction that the jury might consider the dependence of the beneficiaries on the deceased, for the purpose of enhancing the damages. But later, when the court came to lay down the rules, the jury was pointedly instructed that the plaintiff and her son were only entitled "to such a fair and temperate sum of money as would compensate them for the loss of the husband and the father." All sentimental considerations were carefully excluded, and the jury was restricted to an estimate of a pecuniary compensation for the pecuniary loss they had sustained. Under the Tennessee statute, the widow and son were entitled to recover the damages resulting to them from the death of the husband and father. The measure of

this was the value to them of the life lost. Estimated in money, it was what his life was worth as a prospective producer of money, and, under the charge as given, it was worth no more in that sense to the widow and son than it would have been to the estate; indeed, if anything, it was worth less. Counsel for the plaintiff in error, after quoting the rules laid down in *Davidson v. Severson,* says:

"The rules referred to for the determination of the pecuniary loss to the widow and children embrace only the pecuniary value of the life of the deceased, to be determined upon the consideration of his expectancy of life, his age and condition of health and strength, his capacity for earning money through skill in art, trade, profession, occupation, and business, and his personal habits as to sobriety and industry; all modified, however, by the fact that the expectancy of life is at most only a probability based upon experience, and also by the fact that the earnings of the same individual are not always uniform."

Conceding this to be a fair summary of the law as it stands, we content ourselves, for the purpose of comparison, with quoting the language complained of, believing it kept well within the rules and fairly set forth the elements to be considered:

"Obviously there are no such scales with which a jury may measure the damages to a widow and son for the loss of the husband and father. Sentimentally considered, and if you were allowed to fix any damages to assuage their mental sufferings by reason of the loss, there is not money enough in the banks to pay such damages. But the law does not allow you to proceed upon any such theory. It is simply a pecuniary compensation for the pecuniary loss they have sustained. But the jury is not left without some guidance of facts to enable them to determine what would be fair, reasonable, and temperate compensation. There is the age of the plaintiff to begin with. The law does not allow you to take a pencil and tablet and calculate by multiplication the amount of his yearly income by the number of years of his expectancy. Now the proof here is that this man was thirty-nine years old, and you, as men of ordinary affairs, will know about how long a man thirty-nine

such that you cannot very well set down and find on one side the debit and on the other side the credit, and render a verdict accordingly. You can't, from the nature of the circumstances and inquiry, determine what you are to start with on one side, and what you are to deduct on the other side; and therefore the law only allows you to look at this question of damage and expectancy as a substantive fact in the case, to see what kind of man he was, whether young or old, and what was the value of that particular man in life. And then it allows you to look at his earning capacity in the same way. What was his capacity in business? What kind of money did he earn? and what kind of man was he about earning money? so as to determine, the best you may, the value of his particular life to his widow and son. Such multiplication as that does not afford, and the jury is not allowed to use it as a basis of their calculations at all, for the reason that it is impossible, on the other side, to estimate by calculation any deductions for loss of time at work, by sickness, or any contingencies of human life, that prevent a man from earning every day of his life all that his earning capacity would justify. Therefore it is that all the use that you can make of the expectancy is that a man of Mr. Letson's age would live about twenty-nine or thirty years. Of course, if he were older or if he were younger, other conditions being equal, you could not give the widow and children of an old man who was nearer the grave the same sum of money that you would a younger man. Next, the Supreme Court of the United States mentions the man's health, which, of course, is an important element in the proof, as an unhealthy and sickly man's life would not be worth as much to the widow and children in a pecuniary sense as the life of one who was in good health. The next is the element of his strength and his capacity to earn money. You take into consideration the man's earning capacity. In determining that, of course, the amount of money that he does earn, if it is in proof before you, is an important element of consideration; but it is not necessary that he should show a fixed income in order to show an earning capacity. It is what he is capable of earning that enters into the calculation, rather than what he actually earns in fact. What he actually earns in fact may be a demonstration of his earning capacity, and yet it may be more than he actually earns. It is not impossible that his fair and reasonable earning capacity might be less than he earns, in fact, under exceptional circumstances — such as favoritism, for instance. So the jury looks to the man's strength and earning capacity as an element in their calculation. In determining this question, you may look at any fact or circumstance in the proof that tends to show what it was. Some objection has been made in this case that no earning capacity has been shown except by showing the mode of living, and it is said that the man may have been living on other people's money and not on his earnings, because it is said that he had recently gone through the bankruptcy court, showing that he was a man who had been in debt. All these circumstances you are to consider for what they may be worth in your opinion in determining what the man's earning capacity was to support his wife and children. If he did, as a matter of fact, support his wife and children in a particular style, you may consider that fact in determining what his earning capacity was. If you should see that he got the money from other sources than from his own efforts and his own earnings or income, that would be a matter also to be determined. But in the absence of proof

hat he had other sources of income from which to support his family, you would be authorized, I should think, to infer from the fact that he supported his family in a particular style that his earning capacity was equal to that task, in making this estimate of damages to be allowed his widow and son. Certainly what they have lost by his death is that which they received through his life. And, then, you may look to his family, in its condition of dependence upon him, if such was a fact. So, gentlemen of the jury, you look to all the facts and circumstances in this man's condition, such as those which have been indicated, and similar circumstances that may appear in the proof, whatever they are, and estimate, as best you may, the value of the man's life to his widow and son."

The judgment is affirmed.

TANNER v. TOWN OF AUBURN ET AL.

Washington Supreme Court — Feb. 9, 1905.

37 Wash. 38, 79 Pac. 494.

1. CONTRACT FOR LIGHTING STREETS AND PUBLIC PLACES — LETTING TO LOWEST BIDDER. — A contract for lighting the streets and public places of a town is not a contract for the erection, improvement, or repair of a public building or work, or for street work, within the meaning of L. 1903, p. 33, c. 29, providing that such contracts shall be let to the lowest bidder after notice.
2. POWER OF PUBLIC OFFICIALS TO CONTRACT FOR LIGHTING STREETS. — The power of a town council to enter into a contract for light for a period of three years and beyond the term of office of the officers executing the contract cannot be questioned, in the absence of some constitutional or statutory prohibition.

Appeal by plaintiff from a judgment for defendants. *Affirmed.*

Tucker & Hyland, for appellant.

Todd, and *I. B. Knicker-*

Electric Railway, the town, and its officers from carrying out the terms of the contract. The court below dismissed the action, and from its judgment an appeal is taken. The appellant claims that the contract above set forth is void for two reasons: First, because the contract was not let to the lowest bidder after notice, as required by the act of March 4, 1903 (Laws 1903, p. 33, c. 29); and, second, because the contract extended beyond the term of office of the officers letting and executing the same. The above act, so far as material to the question now under consideration, is as follows:

"In the erection, improvement and repair of all public buildings and works, in all street and sewer work, and in all work in or upon streams, bays or water fronts or in or about embankments, or other works for protection against overflow and in furnishing any supplies or materials for the same, when the expenditure required for the same exceeds the sum of five hundred dollars, the same shall be done by contract and shall be let to the lowest responsible bidder, after due notice, under such regulations as may be prescribed by ordinance."

The appellant relies on the decision of this court in the case of *State v. Pullman,* 23 Wash. 583, 63 Pac. 265, 83 Am. St. Rep. 836. In that case "the regents of the Agriculture College, Experiment Station, and School of Sciences of the State of Washington entered into a contract with the city of Pullman, through its mayor, that the college or the State would construct a reservoir on a point of land in the rear of the college, of $250,000 gallons capacity, lay a six-inch main therefrom to connect with the town pump of the city of Pullman, give to the town the use of said reservoir and pipe, and also give to the town the right to buy the said main at actual cost of laying the same, a certain monthly stipend for pumping the water for the use of the college, and a certain number of cents per gallon for water used for irrigation. At the end of the term for which the contract ran the city refused to buy the plant, and this action was brought by the State to recover the value thereof, which was alleged to be $2,171.36." It can readily be seen that the contract in that case was, in substance and effect, a contract for a public work, and came directly within the prohibition of the statute in force at that time. We do not think, however, that a contract for lighting the streets and public places of the town can in any just sense of the term be designated as a contract for the erection, improvement, or repair

of a public building or work, or as street or sewer work, as defined by the act in question. This precise question was before the Supreme Court of California in the case of *Electric Light & Power Co. v. City of San Bernardino,* 100 Cal. 348, 34 Pac. 819. The court in that case says:

"Does the lighting of streets, as here described, come within the term 'street work,' as used in the foregoing provision of the statute? We are satisfied that it does not, and to give such a meaning would demand a construction of the statute entirely unjustifiable by its language. 'Street work' is a phrase of common usage, and has a well-defined signification. The words mean exactly what they indicate upon their face, namely, work upon a street, work in repairing or making a street. The phrase is found in the decisions of this court and in the statutes of the State times without number, and its construction as indicated, to our knowledge, has never been questioned. The parties plaintiff and defendant entered into an express contract. The plaintiff furnished the light at the time and upon the terms demanded by the contract, and the city now refuses to pay the balance due under its contract, upon the ground that notice was not given in the newspapers and bids requested. Such being the status of the case, it certainly is not demanded of us that doubtful constructions, even if this provision gave occasion for them, should be resolved in favor of the defendant. The provision, fairly construed by all rules of construction, does not bring the subject of this litigation within the term 'street work,' as there used. There can be no question as to the sound policy of a law requiring municipal corporations to enter into contracts for the payment of money only after full notice and opportunity for competition; but that is not a matter for our consideration here. We must take the statute as we find it. We can neither add to it nor subtract from it. It is our duty alone to construe it as it stands enacted."

For these reasons we think that the first objection to the validity of the contract is not well taken.

2. The power of a town council to enter into a contract for light

47 Pac. 758; *Splaine v. School District,* 20 Wash. 74, 54 Pac. 766.

The contract in question is not void for any of the reasons stated, and the judgment of the court below is therefore affirmed.

MOUNT, C. J., and DUNBAR, HADLEY, and FULLERTON, JJ., concur.

COMMONWEALTH ELECTRIC CO. v. ROSE.

Illinois Supreme Court — Feb. 21, 1905.

214 Ill. 545, 73 N. E. 780.

1. INSULATION AND PROTECTION OF WIRES — EVIDENCE. — In an action to recover damages for the death of a lineman caused by a shock received from a telephone wire falling across a defectively insulated electric light wire, eveidence *held* sufficient to show that the electric light company were negligent in insulating and protecting its wires as required by a city ordinance.
2. CONCURRENT AND EFFICIENT CAUSE — QUESTION FOR JURY. — Where it appeared that a lineman, killed by a shock, may have slipped from the cable or stand on which he was standing, and the shock aided and contributed to his fall, it is a question for the jury whether or not the shock was a concurrent and efficient cause of the fall.
3. DEATH OF LINEMAN — CONTRIBUTORY NEGLIGENCE. — Whether or not a lineman was in the exercise of ordinary care with reference to the failure to use a belt or rubber gloves, or with reference to the position occupied by him while he was engaged in his work, *held* under the evidence to be a question for the jury.
4. INSTRUCTIONS. — In an action for the death of a lineman killed by an electric shock, an instruction, that ordinary care is that degree of care which an ordinarily prudent person, with deceased's knowledge or means of knowledge of electrical affairs, and situated as deceased was, before and at the time of the accident, would exercise for his own safety, is not prejudicial.
5. ORDINANCE — VIOLATION OF. — Violation of an ordinance, regulating the erection and protection of wires by an electrical company, is *prima facie* evidence of negligence.
6. POLICE POWER — REGULATION AND CONTROL OF ELECTRIC LIGHT COMPANIES. — The regulation and control of electric light companies in respect to their use of the streets, and the erection and construction of their appliances, is within the police power generally delegated by the State to municipal corporations.

Appeal by plaintiff from a judgment of the Appellate Court affirming a judgment for plaintiff. *Affirmed.*

When Violation of Ordinance Prima Facie Evidence of Negligence. — See note to *San Antonio Gas & Electric Co. v. Badders et al., post.*

Statement of facts by MAGRUDER, J.:

This is an appeal from a judgment of the Branch Appellate Court for the First District, affirming a judgment for $5,000 rendered against the appellant company in favor of the appellee in the Superior Court of Cook county in an action on the case prosecuted to recover damages on account of the death of Joseph H. Rose.

The declaration consists of two counts. The first alleges: That on and prior to June 28, 1897, appellant was an Illinois corporation. That the city council of Chicago passed an ordinance granting to appellant the right to construct, maintain, operate, and use on certain streets in Chicago a line of wires or other electric conductors for the transmission and distribution of electricity upon certain terms contained in the ordinance. That a part of said ordinance was as follows: "All conductors and wires, owned and operated by the said company under the provisions of this ordinance, shall be properly insulated, and all overhead conductors, used by said company, shall be protected by guard wires of other suitable mechanical device or devices." That appellant accepted said ordinance, and under the same conducted an electrical business. That on May 10, 1901, appellant had a certain wire, used as a conductor of electricity, and heavily charged therewith, running north and south on Parnell avenue within said city. That said wire was suspended above the ground upon poles and extended across Sixty-seventh street. That, by virtue of the ordinance, it was appellant's duty to maintain said wire in a properly insulated condition, and have it protected by guard wires, or other suitable mechanical device, but that it wantonly and negligently permitted said wire to become and remain in an improper and defectively insulated condition, and unprotected by guard wires, or other suitable mechanical device, as required by said ordinance. That Rose was employed as a lineman by the Chicago Telephone Company, which had certain wires running across on poles at the intersection of Sixty-seventh street and Parnell avenue as aforesaid. That while Rose, in the discharge of his duty, was on one of said telephone poles, and exercising ordinary care, etc., said telephone wire, by reason of appellant's wire not being protected as aforesaid, came in contact with the same, and, by reason of appellant's wire not

street, and a line of appellant's electric light poles and wires extended along the east side of Parnell avenue. The appellant's electric light wires passed under the wires and cable of the telephone line, about two feet lower than the lowest telephone wire or cable. There were two of appellant's electric light wires, each carrying a current of 2,000 volts, while on each of the telephone poles there were five cross-arms, each having pins for ten wires. The distance between these wires on each cross-arm was about twelve inches, except the two next to the pole, which were sixteen inches apart to allow for the pole. At the southwest corner of Parnell avenue and Sixty-seventh street stood one of the telephone company's poles, designated as "Pole No. 2." One hundred and twelve and three-fourths feet east of this pole was another telephone pole — the one at which deceased was at work — designated as "Pole No. 1." One electric light pole was nineteen feet north of Sixty-seventh street, while the next one south was sixty-four feet south of Sixty-seventh street — which was about seventy feet wide — making these two poles about 153 feet apart. The lowest cross-arm of the telephone poles was thirty feet, and the electric light cross-arm twenty-eight feet two inches above the ground. One of the witnesses states that there was only one and one-half feet between the electric light wire and the telephone wire above it. From pole No. 2 to the electric light wires was thirty-six feet, and from the electric light wires to pole No. 1 was seventy-six feet. The telephone line crossed the electric light wires at practically the middle of the electric span, which was about 100 feet. There were from thirty-six to forty wires on the telephone poles. Stretched along on the telephone poles was a steel cable, or "messenger," firmly attached to the poles, used to support a large number of telephone wires, inclosed in a lead tube or casing. This was attached to the pole twenty-two inches beneath the lowest cross-arm of pole No. 1, and three feet and nine inches below the lowest cross-arm of pole No. 2. The cross-arms were about twenty-three inches apart.

On May 10, 1901, the deceased four or five other members of his gang left their work at some other part of the telephone lines, and came to the corner above described at about 2.30 P. M.; their aim being to take down two dead wires, which extended east from the west side of Parnell avenue to Stewart avenue, and extend a new wire along on the third or middle cross-arm, beginning at pole No. 2, and running east. The plan was to cut off the dead wire, or wire not in use, on the bottom cross-arm of the telephone pole, and attach it to the new wire, and by this means draw the new wire from pole 2 to pole 1; it being the intention to get the new wire across and above the electric light wires. The dead wire, which was on the lowest cross-arm and was to be cut at pole No. 1, was to be taken up to the middle cross-arm about four feet above, and the new wire was to be fastened to it at the west pole, and then the new wire drawn across from pole No. 2 to pole No. 1, and so on. The deceased climbed pole No. 1, which was about sixty to seventy feet east of Parnell avenue, and Clark, another of the men, went up pole No. 2 at the southwest corner of Parnell avenue and Sixty-seventh street. Clark stood with one foot on the lower cross-arm and the other leg hooked over the next cross-arm above, and in this position on the west side of the pole detached the old wire from the pin on the bottom cross-arm, raised it to the middle cross-arm, and united it to the end of the new wire, and fixed it so as to hold it at that point. The deceased at pole No. 1 stood on the

steel cable on the west side of the pole, facing southeast, the wire which they were raising being on the south side of the pole. The deceased waited for Clark to get his end up on the third arm and spliced before going further, and, when Clark finished fastening the new wire to the old, he placed his hand in the loop of the wire, and, holding it that way, placed his hand on the cross-arm, touching a guy wire which was there. Clark said, "All right," to the deceased who was already waiting, and thereupon the deceased cut the wire just west of the cross-arm preparatory to carrying it higher. In some manner, after it was cut, the wire came in contact with the electric light wire beneath it, and Clark and deceased both received an electric shock. Clark did not receive the full force of the shock, and then only through a small part of the hand, but it made him jump, although he did not fall. The deceased, however, was standing on the cable, which, in turn, was grounded, thus completing a circuit with the electric light and telephone wires. At the same time when Clark received the shock, deceased cried out, "Oh!" and a flash was seen at his end of the wire. After this exclamation deceased was seen by his fellow workmen hanging to the cross-arm with his arms, having lost his foothold. He hung there a few seconds without saying anything further, or being able to regain his footing, and then fell to the sidewalk beneath, and died in a half hour or so afterwards. Upon examination it was found that the telephone wire had been burned in two where it came in contact with the electric light wire.

F. J. Canty and *J. C. M. Clow,* for appellant.

James C. McShane, for appellee.

Opinion by MAGRUDER, J.:

The facts of this case are settled by the judgment of the Superior Court of Cook county, and the judgment of the Branch Appellate Court for the first district affirming the same, in favor of the appellee. At the close of the appellee's evidence, and again at the close of all the evidence, the appellant asked the court to give to the jury a written instruction, requiring them to find the defendant not guilty. The instruction thus asked was refused, and the only question for us to consider, so far as the evidence is concerned, is whether or not the proof tends to sustain the cause of action.

First. The evidence tends very strongly to show that the appellant company was guilty of negligence, as charged in the declaration. The ordinance, referred to in the statement preceding this opinion, and the material part of which is set out in *hæc verba* in the declaration, required the appellant company to properly insulate all the conductors and wires owned and operated by it under the provisions of the ordinance, and also required appellant

to protect all overhead conductors used by it by guard wires or other suitable mechanical device or devices. The proof is practically without contradiction that there was no guard wires to protect the electric wires, used by the appellant at the intersection of Parnell avenue and Sixty-seventh street, where such wires passed under the wires of the telephone company, running east and west. Guard wires are defined in the evidence as being wires running parallel with the electric wires, and above them, "so as to keep anything from above dropping upon them," and there are usually three of the guard wires, one on each side of the electric wires, and one above them. The guard wires have no electricity in them. One of the witnesses testified: "There were no guard wires at the street intersection." The following is the testimony of another witness: "Q. Were there any guards there? A. No, sir; no guards." The proof also tends to show that the electric light wires were not protected by any other suitable mechanical device. As the plats and diagrams in evidence, and the statements of the witnesses, show that there was nothing at all over the electric light wires, there could have been no other device over the electric light wires as a protection. The testimony tends to show that, if there had been such guard wires over the electric light wires to protect them, no electric shock would have been produced, when one of the telephone company's wires, stretched above the electric light wires, fell upon the latter and came in contact with them.

The evidence also tends to show that, at the time the accident occurred, the electric light wires were not properly insulated, as required by the ordinance. The absence of proper insulation is sustained by the testimony of both sides. The insulation was a sort of rubber covering, and is described by the witnesses as having been in a rough, frayed condition, so that little strips were hanging from it. It is also stated by some of the witnesses to have been worn off in a great many places at that point. It was in a ragged condition. One of appellant's witnesses states that the insulation in some places was very bad, and gave, as a reason why he regarded it as bad, that he saw "strings hanging down." The insulation is stated to have been made of some kind of nonconducting fiber, soaked in a moisture-proof compound, and also nonconducting material, which adhered closely to the wire. As one of the

purposes of insulation was to keep out water, it was in a defective condition as soon as it began to loosen. The testimony tends to show that, if the electric light wires of the appellant had been properly insulated, the electric shock, which either alone or in connection with other causes, caused the death of Rose, would not have occurred when the telephone wire over the electric light wires fell or swayed, so as to come in contact with the latter.

While the appellant does not seriously oppose the contention that there was an absence of such guard wires and insulation, as were required by the ordinance, yet it claims that the injury was not caused thereby. The evidence tends to show that the swaying or falling of the telephone wire, so as to come in contact with the eelctric wires beneath it, was an almost necessary result of the character of the work which the deceased and his fellow workmen were doing. The proof is quite clear that the deceased did receive an electric shock, produced by the contact between the two classes of wires. The witness, Clark, swears that he received a shock, and let go the wire, and that he and the deceased both had hold of the same wire, so that the same shock, which caused Clark to "jump," passed into the body of the deceased. Clark says:

"Everything was all right, and then I told him I was ready, and the next thing I knew I received the shock, and I immediately let go and got my hand in the clear. It came from the electric wire between Rose and myself. It was the same thing he got; the same shock. We both had hold of the same wire. When I got shocked, it caused me to let go and jump to one side; but I did not lose my footing."

The witnesses speak of seeing a flash, and of hearing the de-

exercise of ordinary care for his own safety. *Pullman Palace Car Co. v. Laack,* 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; *Chicago & Alton Railroad Co. v. Harrington,* 192 Ill. 9, 61 N. E. 622.

The case at bar is somewhat similar in its facts to the case of *Economy Light & Power Co. v. Sheridan,* 8 Am. Electl. Cas. 795, 200 Ill. 439, 65 N. E. 1070, and the principles of law there announced are applicable here. In the Sheridan Case, *supra,* it was said, where the plaintiff's intestate came in contact with an electric light wire and received an electric shock which threw him from the pole upon which he was working to the ground, and caused his death, that "there was no direct proof that the deceased came in contact with the electric light wire, and that he received an electrical shock which threw him from the pole to the ground, but from the facts and circumstances proven it might fairly and reasonably be inferred that such was the cause of his death. That such was the fact was susceptible of being proven by circumstantial, as well as by direct testimony." We are of the opinion that the evidence tends to show that the appellant company was guilty of negligence in the respects above indicated, and that such negligence was the cause of the injury to the deceased.

Second. The next question which arises under this branch of the case is whether or not the deceased was in the exercise of ordinary care for his own safety at the time when the accident occurred. This was a question of fact for the determination of the jury, and was submitted to them, as we think, under proper instructions. It is claimed by the appellant that the deceased was guilty of contributory negligence upon four alleged grounds: First, that he knew of the defective condition of the electric light wires; second, that his position upon the pole was not proper; third, that he should have worn a belt, and, fourth, that he should have worn rubber gloves. The evidence does not show conclusively that the deceased had actual knowledge of the absence of the guard wires, and of the improper condition of the insulation. The wires were some twenty-eight or thirty feet above the ground, and some of the testimony is to the effect that it was not possible for a person, standing on the ground, to see the exact condition of the wires overhead. The proof shows that there was some conversation among some of the men, while going from a former job, upon which they had been at work, to the corner of Parnell avenue and

Sixty-seventh street, in reference to the defective condition of the wires as to insulation; but it is not clear that this conversation was heard by the deceased. On the contrary, the testimony tends to show that the knowledge of the witnesses, testifying as to the defective condition of the electric light wires, was acquired by them after the accident occurred, and not before the occurrence of the same.

It is said that the deceased was guilty of contributory negligence, because he stood upon the steel cable or "messenger" attached to the poles, whereas Clark, one of the men who was at work upon the pole west of the one where the deceased was working, placed himself, or a portion of his body, upon one of the cross-arms of the pole. There is evidence, however, tending to show that the circumstances under which the deceased was at work were different from those under which Clark was at work, and that the position of the deceased, while standing upon a firm steel cable carrying no current, left him free to use his hands in doing his work, and was a convenient and proper mode of doing the same. There was nothing to show that the deceased had any reason to expect a shock, and it was for the jury to say whether or not the position which he occupied while doing his work indicated that he was guilty of negligence.

It is also said that the deceased was guilty of negligence, because he did not have a belt attached to the pole at the time he received the shock. There is evidence tending to show that the belt is used ordinarily in construction work, or a different kind

have been necessary to unhook it in climbing up and down the pole, and that the braces, which extended outward from the pole just above each cross-arm to the next arm above, would have prevented the slipping of the belt high enough to have enabled the deceased to have stood on the second cross-arm.

What has been said is also applicable to the question whether or not the deceased was guilty of negligence in not using rubber gloves. There is some proof tending to show that there were rubber goves in the wagon in which the workmen rode when they came to the point where the deceased and his companions were to do their work. There is, however, proof tending to show that rubber gloves are used entirely in handling what are called "live" wires; that is, wires with a current. The wires, which it was necessary for the deceased to handle in doing the work in which he was engaged, were not charged with any current, as we understand the testimony. In short, there is evidence tending to show that the use of rubber gloves by deceased in the work, which he was doing, would have been an inconvenience. We are unable to say that there is no evidence tending to show that the deceased was in the exercise of ordinary care for his own safety. The question whether or not he was in the exercise of such care with reference to the failure to use the belt or the gloves, or with reference to the position occupied by him while he was engaged in his work, was submitted to the jury by the instructions asked by and given for both parties.

Third. It is claimed by appellant that the court erred in giving to the jury the second instruction, which was given for the appellee, and which is as follows:

"The court instructs the jury that ordinary care, as mentioned in these instructions, is that degree of care which an ordinarily prudent person, *with deceased's knowledge or means of knowledge of electrical affairs*, and situated as deceased was, before and at the time of the accident, would exercise for his own safety."

The objection made to this instruction is that it included the italicized words as above indicated. We concur in the following views, expressed by the Appellate Court in their opinion deciding this case, in reference to the instruction above quoted, to wit:

"The instruction obviously refers to the question of whether the deceased exercised ordinary care for his own safety. In our opinion the defendant was not prejudiced by the words complained of. The deceased was an experienced

lineman and had been a foreman. Acts or conduct on his part might amount to or constitute negligence, when the same acts or conduct on the part of one wholly ignorant of electrical affairs would not amount to negligence. It was for the jury to find, from all the evidence, what the deceased did, or failed to do, and then to say whether such acts and conduct showed ordinary care on his part for his own safety, or amounted to contributory negligence. This included as well the acts and conduct of the deceased in placing himself in the position in which he was, as his acts and conduct in that position; but we cannot see that the instruction is subject to the criticism that it assumes that the deceased exercised ordinary care in placing himself in the position in which he was at the time he fell."

The instructions could have worked no injury to the appellant, because the clause objected to imposed upon the deceased a higher degree of care than an ordinary person would be required to exercise under the same circumstances. The evidence shows that the deceased was, or should have been, versed in electrical affairs, and hence was charged with a knowledge of the dangers surrounding him greater than an ordinary person would be charged with.

In addition to this, the error in inserting the italicized words in the instruction, if there was error, was cured by the instructions which were given, inasmuch as from a consideration of all the instructions, regarded as one charge, the jury could not have been led into any error as to the degree of ordinary care which the deceased was required to exercise. Instruction 1 given for the appellee and instructions 13, 17, 20, 6, 7, and 16 given for the appellant all required that the deceased should exercise ordinary care for his own safety. Instruction 6, given for the appellant, told the jury that, if they believed from the evidence

[illegible]

[illegible]

[illegible]

to pass, the violation of the ordinance is *prima facie* evidence of negligence. Under its charter the city of Chicago had the right to regulate the use of the streets and to provide for the lighting of the same. 1 Starr & C. Ann. St. 1896 (2d ed.), p. 694, c. 24, par. 63. In addition to this, "the regulation and control of electric light companies in respect to their use of the streets, and the erection and construction of their appliances, is within the police power generally delegated by the State to municipal corporations." 10 Am. & Eng. Enc. of Law (2d ed.) 863. "The special duty, a violation of which is negligence in law, may also be created by statute or ordinance." 21 Am. & Eng. Enc of Law (2d ed.) 460. The ordinance here in question, having been passed in pursuance of a power conferred by statute, has the force and power of the statute. *United States Brewing Co. v. Stoltenberg,* 211 Ill. 531, 71 N. E. 1081, and authorities there referred to.

Nor can it be said that the ordinance in question is indefinite and uncertain by reason of the use of the words, "or other suitable mechanical device or devices." Nor is there any delegation of power by the ordinance to a city representative to determine what are suitable mechanical devices. A statute, relating to fire escapes, which provided, among other things, that certain buildings "shall also be provided with one or more automatic metallic fire escapes, or other proper device," and imposed upon the inspector of factories certain duties with reference to enforcing the same, has been sustained by this court. *Arms v. Ayer,* 192 Ill. 601, 61 N. E. 851, 58 L. R. A. 277, 85 Am. St. Rep. 357. See, also, to the same effect *McRickard v. Flint,* 114 N. Y. 222, 21 N. E. 153, and *Willy v. Mulledy,* 78 N. Y. 310, 34 Am. Rep. 536. The views, expressed in the Ayer and Flin Cases, *supra,* apply here. Moreover, the proof shows that appellant accepted the ordinance without qualification, and availed itself of the benefits of the same, and therefore is now estopped from repudiating its conditions. *Chicago General Railway Co. v. City of Chicago,* 176 Ill. 253, 52 N. E. 880, 68 Am. St. Rep. 188; 21 Am. & Eng. Enc. of Law (2d ed.) 979. We are of the opinion that the trial court committed no error in refusing the instructions upon this subject, or in refusing to exclude the ordinance.

The refusal of some other instructions is complained of, but they were erroneous as seeking to confine the attention of the jury

to the absence of proper insulation alone, without reference to the additional requirement of the ordinance as to the protection of the electric light wires by guard wires, and as excluding from their consideration the receiving of the electric shock as a concurring cause of the deceased's fall.

Fifth. Complaint is also made on behalf of the appellant that counsel for appellee made improper remarks in his address to the jury. We discover nothing in the remarks so made which transgressed the limits of legitimate argument. The remarks alleged to have been improper related to the acceptance of the ordinance by the appellant company, and the failure of that company to obey it after its acceptance. The inference and argument in reference to the acceptance were, as we think, justified by the facts, and such facts were substantially undisputed. Other remarks, alleged to have been improper, were comments made by counsel upon the testimony and conduct of one of the appellant's witnesses. Counsel may arraign the conduct of the parties, and impugn, excuse, justify, or condemn motives, so far as they are developed in evidence, or assail the credibility of witnesses when it is impeached by direct evidence, or by inconsistency, or incoherency of their testimony, their manner of testifying, their appearance upon the stand, or by circumstances. "He may argue such conclusions from the testimony as he pleases, provided he does not misquote witnesses." 2 Enc. of Pl. & Pr. 716. It has been said: "Just and fierce invective, when based upon the facts in evidence and all legitimate inferences therefrom, is not discountenanced by the courts." Id. p. 747.

For the reasons above stated, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

WILLIAMS v. NORTH WISCONSIN LUMBER CO.

Wisconsin Supreme Court — Feb. 21, 1905.

124 Wis. 328, 102 N. W. 589.

1. DEATH BY SHOCK FROM LIVE WIRE — COMPLAINT CHARGING NEGLIGENCE. — The complaint in this action, as originally shown, charged as one ground of actionable negligence that the defendants carelessly and negligently turned on the electric current without notice to the deceased, and knowing that the deceased was either working upon or likely to be working

upon the wires, whereby the deceased was killed. *Held*, that it was proper to amend the complaint by striking out the further allegation that the death was wholly caused by the wilful, wanton, reckless, negligent act of the defendants.

2. ORDINARY CARE — INSTRUCTIONS. — Ordinary care is that degree of care usually or ordinarily exercised by persons of ordinary care and prudence engage in the same or similar business under the same or similar circumstances. A charge, defining ordinary care as such as is ordinarily used by persons where conduct is the test under the facts and circumstances surrounding them at the time, is erroneous.

3. DUTIES OF MASTER TO SERVANT. — A master owes certain duties to his employees which he cannot delegate, such as the duty to furnish a reasonably safe place to work, the duty to furnish reasonably safe tools and appliances, the duty to provide reasonably competent and careful fellow servants, and the duty to warn an employee of latent dangers.

4. SAME — DELEGATION OF DETAILS — CHANGING OF ARMATURE. — Where the master has provided a safe place, safe tools, competent and careful employees, and has given sufficient warning of hidden or latent dangers, he may doubtless commit to employees the details of the work. Thus, the changing of an armature in a power house is a detail of the business which may properly be left to the employees.

5. NEGLIGENCE OF SUPERINTENDENT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. — Whether a superintendent of an electric light plant was negligent, so as to impose liability upon himself, in turning on the current without notice to a lineman, and whether the lineman was guilty of contributory negligence in splicing a wire without notifying the superintendent are questions for the jury.

Appeal by defendants from a judgment for plaintiff. *Reversed.*

Statement of facts by WINSLOW, J.:

This is an action by the plaintiff, as administratrix of the estate of Ben Williams, deceased, for damages sustained by her as widow of said Ben Williams on account of his death, which is claimed to have been caused by the negligence of the defendants on September 1, 1902. The evidence showed, without substantial dispute, the following facts: At the time of the accident, and for some time prior thereto, the defendant lumber company owned and operated a sawmill at the village of Hayward, and also an electric light plant, with which it lighted its factory and the streets and residences of said village; and that the defendant Rogers was the superintendent of its lumber business as well as the electric light business. For a number of years the deceased, Ben Williams, operated a dynamo at the electric light plant at night, and made repairs upon the plant and wires during the forenoon, and took a rest in the afternoon. One Fox was engineer of the engine at the planing mill, and assisted in making repairs on the dynamo from time to time. Three days before the death of Williams the armature of the dynamo was burned out and taken to Minneapolis by Rogers to be repaired, and during his absence the street lights were not in operation. Rogers returned with the armature on Saturday night, but it was not put in position until Monday, which was the day of the injury. On that day defendant Rogers

upon the wires, whereby the deceased was killed. *Held*, that it was proper to amend the complaint by striking out the further allegation that the death was wholly caused by the wilful, wanton, reckless, negligent act of the defendants.

2. ORDINARY CARE — INSTRUCTIONS. — Ordinary care is that degree of care usually or ordinarily exercised by persons of ordinary care and prudence engage in the same or similar business under the same or similar circumstances. A charge, defining ordinary care as such as is ordinarily used by persons where conduct is the test under the facts and circumstances surrounding them at the time, is erroneous.

3. DUTIES OF MASTER TO SERVANT. — A master owes certain duties to his employees which he cannot delegate, such as the duty to furnish a reasonably safe place to work, the duty to furnish reasonably safe tools and appliances, the duty to provide reasonably competent and careful fellow servants, and the duty to warn an employee of latent dangers.

4. SAME — DELEGATION OF DETAILS — CHANGING OF ARMATURE. — Where the master has provided a safe place, safe tools, competent and careful employees, and has given sufficient warning of hidden or latent dangers, he may doubtless commit to employees the details of the work. Thus, the changing of an armature in a power house is a detail of the business which may properly be left to the employees.

5. NEGLIGENCE OF SUPERINTENDENT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. — Whether a superintendent of an electric light plant was negligent, so as to impose liability upon himself, in turning on the current without notice to a lineman, and whether the lineman was guilty of contributory negligence in splicing a wire without notifying the superintendent are questions for the jury.

Appeal by defendants from a judgment for plaintiff. *Reversed.*

Statement of facts by WINSLOW, J.:

This is an action by the plaintiff, as administratrix of the estate of Ben Williams, deceased, for damages sustained by her as widow of said Ben

sent a boy to the residence of Williams to ask him to come to the dynamo room and assist in repairs. The boy, however, returned with the information that Williams was not at home, having taken his daughter out into the country to a school which she was teaching, and that he would not return until after dinner. Thereupon Rogers set Fox to work putting in the armature, and at about one o'clock Fox had completed the adjustment of the armature, and Rogers came to the dynamo room at this time and gave Fox assistance in completing the work, and then instructed him to turn on the steam and start the engine to see if it worked satisfactorily. Fox turned on the power, but for some reason it did not operate satisfactorily, and Rogers thereupon pressed the brushes (which are a part of the dynamo) with his hands, and again ordered the power turned on, which was done by Fox, and a good current was produced, and after running a few moments the power was shut off. It further appears that Williams had driven into the country about half-past seven o'clock that morning with his daughter, and that he arrived home shortly before noon; that during his absence some men who were moving a building through the street sent word to Williams' residence requesting him to cut one of the electric light wires which was in the way of the moving building; that Adolph Williams, son of the deceased, who had worked for some months as assistant to his father, volunteered to cut the wire, and did so; that when deceased arrived home his son informed him of the cutting of the wire, and deceased then proceeded to the place for the purpose of splicing the same, and without informing Rogers of his intention he climbed the pole, and was attempting to splice the ends of the wire at the very time when the test current was turned on by Rogers, and in some manner the deceased came in contact with both the negative and positive wires, thereby producing a short circuit, and causing his death; that it was the practice of Rogers during all the time while deceased acted as electrician that the current should not be turned into the wires by any person other than the deceased, or, if done by any one else, that the deceased should first be notified; that deceased did not know that the armature had returned when he was attempting to splice the wires, and that neither Rogers nor Fox knew that the wire had been cut, or that the deceased had returned from his errand in the country.

Both defendants moved for direction of a verdict, which motions were overruled. The court charged the jury, at the request of the defendants, as follows: "(1) You are instructed that in repairing the dynamo and testing it both Rogers and Fox were fellow servants of Ben Williams, and that he, the said Williams, assumed the risk of any injury which might be caused by their negligence in making such repairs and test. (2) You are instructed that you cannot find the defendant North Wisconsin Lumber Company negligent in this action on account of any failure on its part to furnish reasonably safe tools, implements, and appliances with which Ben Williams was required to work. (3) You are instructed that you cannot find defendant lumber company negligent because of any incompetency of either Fox or F
You are instructed that to make the defendant lumber company
action the plaintiff must satisfy you by a fair preponderance of
that the lumber company failed in one or more of the following
That it failed to furnish him a reasonably safe place in which to
(2) that it failed to provide him with reasonably safe and

plements and apparatus; (3) that it failed to provide reasonably competent and careful coemployees to work with him. These are the three duties the master owes to his servant, and before the plaintiff can recover she must satisfy you that the defendant lumber company failed in some one or more of these three respects. (5) You are instructed that there is no evidence in this case tending to show that the defendant lumber company did not provide reasonably safe and suitable tools and apparatus and reasonably careful and competent employees. (6) You are instructed that in performing the act of directing Fox to turn on the current to test the armature Rogers was acting as a fellow servant of deceased, and the defendant lumber company is not liable for such direction, even though you believe it was negligently given. (7) If you find deceased was guilty of any want of ordinary care, however slight, which contributed directly to his death, the plaintiff cannot recover. (8) You are instructed that the duty to warn deceased that the current was about to be turned on did not exist unless you are satisfied from the evidence that the defendant lumber company or Rogers knew, or ought to have known, that the deceased was or might probably be engaged in repairing the wires. (9) You are instructed that you cannot find for the plaintiff and against either defendant unless you are satisfied to a reasonable certainty by a fair preponderance of the evidence that one or both of the defendants was guilty of some negligent act or omission which was the proximate cause of Ben Williams's death. (10) You are instructed that you cannot find that the negligent acts or omissions of the defendants, or either of them, were the proximate cause of deceased's death, unless you are satisfied that the injury to deceased was the natural and probable result of such act or omission, and unless you further find that an ordinarily prudent person in the light of the attending circumstances would have anticipated that injury might probably occur by reason of such act or omission. (11) You are instructed that you cannot find defendant lumber company liable to plaintiff simply because Rogers neglected to inform deceased that he (Rogers) was about to have the current turned on. (12) You are instructed that you cannot find defendant lumber company liable simply because Rogers directed the current to be turned on at the time he did. (13) You are instructed that deceased, by his contract of employment, assumed all risk of injury by reason of the negligent manner in which his co-employees might carry on the work of their common master. (14) You are instructed that the fact that the insulation of the wires was defective was not the proximate cause of deceased's death." The court further charged, of its own motion, as follows: "Now, gentlemen, it is for you to say, under the whole evidence in this case, whether these defendants, or either of them, were guilty of such an act of negligence as they should be compelled to respond in damages for this accident. I have given you certain propositions of law which it is your duty to adhere to and follow in arriving at a verdict. The claim of the plaintiff is that, owing to a lack on the part of defendants, and especially owing to a lack on the part of defendants' general manager, Rogers, in failing to give the deceased, Williams, notice before the current of electricity was turned on, that the defendants were guilty of such an act of negligence as to make it actionable under the law, while the claims of defendants were that they used every ordinary caution and used all the foresight that could be expected of them under the particular facts and circumstances surrounding this case. It is for you,

gentlemen, and you alone, to say what the truth is in that respect. I might say here that you cannot find a verdict in favor of the plaintiff unless you find that the defendants, or at least such one of them against which you may find a verdict, was guilty of negligence. Negligence is defined to be a lack of ordinary care, or such care as persons (or, in this case, corporations) of ordinary care or prudence ordinarily use under all the facts and circumstances surrounding them at the time." The jury rendered a verdict for the plaintiff against both defendants, and assessed the damages at $5,125. Motions were made by both defendants for judgment *non obstante,* and also that the verdict be set aside, and for a new trial; all of which motions were overruled, and judgment entered for the plaintiff on the verdict, and the defendants separately appeal.

Bundy & Wilcox, for appellants.

N. F. Bailey, S. J. Williams, and *H. B. Walmsley,* for respondent.

Opinion by WINSLOW, J.:

The complaint in this action, as originally drawn, charged as one ground of actionable negligence that the defendants carelessly and negligently turned on the electric current without notice to the deceased, and knowing that the deceased was either working upon or likely to be working upon the wires, whereby the deceased was killed. The complaint then went on to negative any negligence on the part of the deceased, and stated that the death was wholly caused by the "wilful, wanton, reckless, negligent act of the defendants," and by their turning on the electric current knowing that said deceased was working upon the wire. At the opening of the trial the plaintiff moved to amend the complaint by striking out the words "wilful, wanton, and reckless," and the court permitted the amendment, stating that, if a sufficient affidavit of surprise were filed by defendants, the case would be continued at plaintiff's costs. The defendants excepted to the ruling, but made no claim of surprise. There was no error in the ruling. The clauses of the complaint which were intended to state the gist of the cause of action plainly charged simple negligence, not gross negligence or wilful wrong. The subsequent characterization of the act as "wilful, wanton and reckless" as well as negligent was plainly contradictory and confusing as tending to introduce an inconsistent cause of action, namely, one based on gross negligence, and it was entirely proper to strike out these words.

The main questions in the case, however, are the questions whether the evidence showed any liability on the part of the defendants and the question whether the charge of the court was erroneous. The test of ordinary care given in the charge is certainly inaccurate, and we can but regard the inaccuracy as prejudicial. Ordinary care has been frequently defined by this court as that degree of care usually or ordinarily exercised by persons of ordinary care and prudence (or the great majority of people) engaged in the same or similar business under the same or similar circumstances. *Rylander v. Laursen* (present term), 102 N. W. 341, and cases cited. Comparing this long-established rule with the rule given in the charge, it is apparent that an important element has been omitted. The people, whose ordinary conduct is to be the test, must be surrounded by the same or similar circumstances as surrounded the persons whose act is in question. This necessary element is wholly left out, and, instead thereof, it is said that ordinary care is such as is ordinarily used by persons whose conduct is the test "under the facts and circumstances surrounding them (*i. e.*, the persons whose conduct is the test) at the time." Plainly, these last-named "facts and circumstances" might well be entirely different from the facts and circumstances surrounding the defendants in the instant case. This instruction, therefore, was erroneous, and necessitates a reversal of the judgment as to both defendants.

Proceeding to a critical examination of the general character of the charge, we confess that we have experienced great difficulty in ascertaining upon what theory this case was submitted to the jury. The alleged defective insulation of the wires was eliminated from the case, as will be seen by instruction No. 14. The court charged positively that the defendant lumber company could only be held liable if it failed either (1) to furnish a reasonably safe place to work, (2) to provide reasonably safe and proper tools, or (3) to provide reasonably competent and careful coemployees. In immediate connection with this proposition the court charged, in effect, that there was no evidence that the defendant company had failed to provide either safe and suitable tools or careful and competent coemployees, and that the company could not be found negligent on either account. Thus both the second and third grounds of possible liability on the part of the defend-

ant company were excluded from consideration, leaving only the question of the failure to furnish a safe place to work. But, after the claim of defective insulation is negatived, the electric light pole, where the plaintiff's intestate was engaged at work, appears to have been as safe as such places are ordinarily made. There was no danger save the necessary danger arising from the fact that it carried two electric wires which might at any time be charged with a deadly current of electricity. The failure to warn Williams of the turning on of the current was the act of negligence which was claimed to be the proximate cause of the injury, both in the trial court and by the respondent's brief in this court. Hence, if the court was correct in the enumeration of the sole grounds of liability against the company, it seems certain that upon his own theory he should have instructed the jury to return a verdict for the company. But passing from this apparent inconsistency, we find that upon the subject of the failure to give notice the court charged that both in repairing and testing the dynamo Rogers and Fox were fellow servants of Williams, and that Williams assumed the risk of any injury arising from their negligence in making such repairs and test; and, further, that the lumber company could not be found liable simply because Rogers directed the current to be turned on, because he neglected to inform deceased that the current was about to be turned on. We have been unable to see what question remained as to the alleged liability of the lumber company after the instructions above cited had been given. Not only had the three specific grounds which alone (upon the court's own theory) would justify a recovery by the plaintiff been negatived by the court, but the possible additional ground of failure to notify had also been denied by the court.

At this point the plaintiff seems to have been charged out of court, so far as any claim against the lumber company is concerned; but the court then proceeds to say, in substance, that it is for the jury to say whether either of the defendants have been guilty of such an act of negligence as should compel them to respond in damages; that the plaintiff's claim is that Rogers' failure to notify Williams was actionable negligence, while defendants' claim is that they used ordinary caution and foresight under the circumstances; that it is for the jury alone to say what the truth

is in that respect; that a verdict cannot be found against either defendant unless such defendant was guilty of negligence, and that negligence is lack of ordinary care. The sum and substance of the charge is that, notwithstanding none of the facts necessary to charge the defendant company with negligence has been proven, and notwithstanding that the failure of Rogers to notify Williams does not render it liable, still, if the jury find the company guilty of negligence which was the proximate cause of the injury, the jury may find a verdict against the company. What guide the jury had to determine what act or omission could be called negligence under this charge it is difficult to see. Apparently they were given liberty to pronounce anything negligence which they might choose. However this may be, the consideration of the motions to direct a verdict for the defendants and for judgment *non obstante* calls for general discussion of the law applicable to the case, and renders it unnecessary to pass upon the correctness of the various propositions of the charge in detail. When the evidence in the case closed, the only ground upon which liability could be reasonably claimed against either defendant was the ground that the turning on of the electric current without warning constituted actionable negligence. So far as the defendant lumber company was concerned, the solution of this question depended primarily upon the question whether Rogers was a vice-principal or a coemployee in the performance of that act. There are certain duties which the master owes to his employees which he cannot delegate. These are the duty to furnish a reasonably safe place to work, considering the nature of the work in hand; the duty to furnish reasonably safe tools and appliances; the duty to provide reasonably competent and careful fellow servants; and the duty to warn an employee of latent dangers in the work which the employee cannot, in the exercise of ordinary care, be expected to ascertain. *Portance v. Lehigh Valley Coal Co.*, 101 Wis. 574, 77 N. W. 875, 70 Am. St. Rep. 932; *Baumann v. C. Reiss Coal Co.*, 118 Wis. 330, 95 N. W. 139; *Klochinski v. Shores Lumber Co.*, 93 Wis. 417, 67 N. W. 934. When the master has provided a safe place, safe tools, competent and careful coemployees, and has given sufficient warning of hidden or latent dangers, he may doubtless commit to the employees the details of the work, including incidental repairs or readjustment of machinery

made necessary by ordinary prosecution of the business, and which can easily be made by the employees themselves from proper materials furnished by the master; and such servants, thus prosecuting the work or making such readjustment or incidental repairs, become fellow servants, whatever their rank, so that the negligence of one by which others are injured is the negligence of a fellow servant. Cases illustrative of this principle are numerous. *Van den Heuvel v. Nat. Furnace Co.*, 84 Wis. 636, 54 N. W. 1016; *Dahlke v. Ills. Steel Co.*, 100 Wis. 431, 76 N. W. 362; *Okonski v. Pa. & Ohio F. Co.*, 114 Wis. 448, 90 N. W. 429; *Grams v. Reiss Coal Co.* (present term), 102 N. W. 586; *Wosbigian v. Washburn & M. Mfg. Co.*, 167 Mass. 20, 44 N. E. 1058. The present case falls within this principle so far as the defendant company is concerned. The changing of the armature was a detail of the business which might properly be left to the employees themselves. In making this change and testing the operation of the dynamo after the change was made, Rogers was acting as a fellow servant, and for any negligence committed by him therein the master was not liable; and a verdict should have been rendered.

Whether Rogers's act was negligent so as to impose liability upon himself, and whether the deceased was guilty of contributory negligence, were questions for the jury under proper instructions.

Judgment reversed upon both appeals, and action remanded, with directions to enter judgment for the defendant lumber company, and to award a new trial as to the defendant Rogers.

IMESON ET AL. v. TACOMA RAILWAY & POWER CO.

Washington Supreme Court — March 1, 1906.

4 St. Ry. Rep. 1062, 42 Wash. 74, 84 Pac. 624.

FIRE CAUSED BY TROLLEY WIRE — INSUFFICIENCY OF EVIDENCE. — Where it was alleged that a fire, which destroyed plaintiff's mill, originated from a live trolley wire, and, on the trial, plaintiff's testimony showed that after he discovered the fire, he, without noticing the live wire, passed over the place where, subsequently, other persons found the trolley wire, writhing and twisting on the ground, it was held insufficient to make a *prima facie* case.

Appeal by plaintiff from judgment for defendant. *Affirmed.*

John B. Van Dyke, for appellants.

B. S. Grosscup, A. G. Avery, J. F. Fitch, and *Sample J. Pritchard,* for respondent.

Opinion by FULLERTON, J.:

In 1904, the appellant Imeson owned and operated a shingle mill at Midland, in Pierce county. The respondent, at the same time, owned and operated an electric railway, the main line of which passed through Midland some 100 feet north of the appellant's mill. From this main line a spur had been constructed over to a point some ten feet east of the northeast corner of the mill. The railway of the respondent, together with this spur, was equipped in the manner electric railways are usually equipped, and had a trolley wire suspended over its tracks to carry the electric current which furnished the motive power. The mill was burned on the night of June 2, 1904. It was Imeson's conception that the fire was caused by the falling of the trolley wire which had been suspended over the spur track, and, in making his claim to the insurance company in which he had the property insured, he gave this as his belief as to the origin of the fire. On paying the loss, the insurance company took a subrogation receipt, and this action is prosecuted by Imeson and the insurance company jointly to recover the loss suffered. The case was tried below without a jury, and ended in a judgment of nonsuit at the conclusion of the plaintiff's case. This appeal is from that judgment.

Two questions are presented by the record, namely, did the falling of the trolley wire start the fire, and if so, did it fall because of the negligence of the respondent? The conclusion we

just started; that he went at once to the back of the mill for the purpose of starting the pumps, and in doing so crossed the spur track directly in front of the mill and at a place where the trolley wire was afterwards found on the ground. He did not see the trolley wire. It was discovered lying across the path he took some minutes later by other persons who came to the fire, who described it as writhing and twisting on the ground, burning everything with which it came in contact, and making a crackling noise not unlike the sound of firecrackers; in fact, it appeared so dangerous that it was considered unsafe even to throw a stream of water on the fire until it was gotten out of the way. It hardly seems possible that Imeson could have passed over the wire and not have noticed it, in fact he admits as much himself, yet he must have passed over it if it was down at that time. On the other hand, if it was not down at that time it could not have been the origin of the fire. The fact that he did not discover it has, to our mind, almost the force of positive evidence that it was not down, and could not for that reason have been the origin of the fire.

The evidence supporting the appellants' view, moreover, is wholly circumstantial. It rests chiefly on the fact that the wire was discovered to be down so soon after the fire started, and evidence tending to show that it had been insecurely fastened in place originally, and had been recently subjected to severe strains. This would have been more potent had it been shown that there was no other source from which the fire could have originated. But this was a steam mill having its furnaces and engines in the mill proper, and on that day the furnaces had been fired for some special purpose, although the mill seems not to have been in active operation. Thereafter, without specially reviewing the evidence, we are of the opinion that it was insufficient to make a *prima facie* case against the respondent. It was incumbent on the appellants to prove their case with a reasonable certainty, and it was not doing this to show a cause from which the fire might have originated, without showing further that it could have originated from no other cause, or that it was more probable that it originated from the cause shown, than from any other.

The judgment is affirmed.

MOUNT, C. J., and HADLEY, ROOT, CROW, and DUNBAR, JJ., concur.

PADUCAH RAILWAY & LIGHT CO. v. BELL'S ADM'R.

Kentucky Court of Appeals — March 2, 1905.

27 Ky. L. Rep. 428, 85 S. W. 216.

1. DUTY TO INSULATE OR PROTECT WIRES. — Insulation or protection of wires by an electric company should be made perfect, and the utmost care used to keep it so, as to points where people have a right to go for work, business, or pleasure.
2. DEATH OF LINEMAN — EVIDENCE. — In an action to recover for death of a lineman, evidence considered and held sufficient to support a verdict for the plaintiff.

Appeal by plaintiff from a judgment in favor of defendant. *Affirmed.*

Reed & Berry, for appellant.

Campbell & Campbell, for appellee.

Opinion by BARKER, J.:

Appellee's decedent, Charles E. Bell, was in the employ of the appellant, the Paducah Railway & Light Company, as lineman. It becoming necessary to tie a guy wire in an eye bolt on one of the corporation's poles in Paducah, he was directed to climb it and perform that service. When he reached that point on the pole which brought his head close to the first cross-arms, he was heard to utter an exclamation of pain or fright, which attracted the attention of several bystanders, who looked up in time to see him fall head foremost to the pavement below, receiving injuries

of appellant is that, after he reached the point where he was to commence work, he undertook to place his safety belt around the pole and snap it in place; that by accident or oversight he failed to do this, and when he released the pole with his hands, expecting to be held safe by the belt, he fell to the pavement below. Both of these theories were submitted upon each of the trials, and both juries found adversely to appellant.

We have so often held that it is the duty of the employer to furnish the servant with a safe place in which to work that it hardly requires citation of authority in support of this poposition of law. *Angel v. Jellico Coal Mining Co.,* 74 S. W. 714, 25 Ky. Law Rep. 108; *Covington Sawmill & Manufacturing Co. v. Clark,* 76 S. W. 348, 25 Ky. Law Rep. 695. There was no evidence to show that Bell knew anything of the dangerous condition of the pole or the wires, assuming them to have been so. On the contrary, however, the theory of appellant is that the poles and wires were perfectly safe. In the case of *McLaughlin v. Louisville Electric Light Co.,* 6 Am. Electl. Cas. 255, 100 Ky. 193, 37 S. W. 856, 34 L. R. A. 812, it is said:

> "It seems clear to us that appellee should have been required to have had perfect protection on its wire at the point and place where appellant was injured. The fact that it was very expensive or inconvenient is no excuse for such failure. Very great care might be sufficient as to the wires at points where persons need not go for work or business, but the rule should be different as to points where people have a right to go for work, business, or pleasure. At the latter points or places the insulation or protection should be made perfect, and the utmost care used to keep it so."

The rule thus laid down has not been abated in the many utterances of this court on this question since this case was decided. See *Overall v. Louisville Electric Light Co.,* 7 Am. Electl. Cas. 521, 47 S. W. 442, 20 Ky. Law Rep. 759; *Lexington Railway Co. v. Fain's Adm'r,* 8 Am. Electl. Cas. 499, 71 S. W. 628, 24 Ky. Law Rep. 1443; *Schweitzer's Adm'r v. Citizens' General Electric Co.,* 7 Am. Electl. Cas. 571, 52 S. W. 830, 21 Ky. Law Rep. 608; *Macon v. Paducah Railway & Light Co.,* 7 Am. Electl. Cas. 630, 62 S. W. 496, 23 Ky. Law Rep. 50; *City of Owensboro v. Knox's Adm'r,* 76 S. W. 191, 25 Ky. Law Rep. 680. Without discussing them in detail, we think the instructions given by the court were more favorable to appellant than it was entitled to.

There is no foundation for the claim for a reversal on the

ground of misconduct of appellee's counsel. Certain statements purporting to have been made by him in his argument to the jury are incorporated by appellant in its grounds for a new trial, but the bill of expections fails to show that the statements complained of were made, and therefore we do not consider them.

Upon the whole case, we are impressed with the belief that the question as to whether or not Charles E. Bell came to his death through the negligence of appellant or his own was fairly and fully presented to the jury, who found that issue against the corporation. The evidence was very conflicting on the vital issue, and two juries have reached the same conclusion on practically the same testimony. The verdict rendered by both, and especially the latter, in amount evidence a conservative spirit, and under all the circumstances we do not believe appellant has any just ground to complain of the result.

Judgment affirmed.

LYNCHBURG TELEPHONE CO. v. BOKKER.

Virginia Supreme Court of Appeals — March 9, 1905.

103 Va. 594, 50 S. E. 148.

1. INJURY TO BOY FROM TELEPHONE WIRE CHARGED BY ELECTRIC LIGHT WIRE — ADMISSIONS OF MANAGER. — A boy eight years of age, sitting on a box on the sidewalk, using what he supposed to be a string dangling through the limbs of a tree in an adjacent yard, put out his hand and

Error by defendant from judgment for plaintiff. *Affirmed.*

Instructions offered by defendant:

"(1) The court instructs the jury that the burden rests upon the plaintiff to show by a preponderance of evidence every fact necessary to hold the defendant liable for the injury complained of. Such evidence must show more than the probability of a negligent act. A verdict cannot be found on mere conjecture, but there must be affirmative and preponderating proof that the injury of which the plaintiff complains is the proximate result of the negligence of the defendant.

"(2) The court instructs the jury that, in order to entitle the plaintiff to recover, it must appear by preponderating and affirmative evidence that the injury complained of was the proximate result of some act of negligence of the defendant.

"(3) The court instructs the jury that although they may believe that the wire which the plaintiff took hold of was the defendant's wire, nevertheless, if they further find from the evidence that it was located on a lot fenced off from the street in which the plaintiff was at the time by a picket or paling fence, and that the end of the wire which the plaintiff grasped was hanging down about two feet inside said fence, they must find for the defendant.

"(4) The court instructs the jury that in this case the defendant can be held liable only for the probable consequences of any neglect or omission of which it may have been guilty. By 'probable consequences' is meant those consequences which are most likely to result from an act than not; and therefore, unless the jury believe from the evidence that the plaintiff's injury was such a probable consequence or result from some negligent act or omission of the defendant, they must find for the defendant.

"(5) The court instructs the jury that if they believe from the evidence that the injury received by the plaintiff was the result of a combination of unusual circumstances, no one of which can fairly be said to be the direct cause of the injury, then the injury in law is regarded as the result of pure accident, and there can be no recovery for such injury.

"(6) If the jury believe, from the evidence and their observation of the plaintiff on the stand, that he was of sufficient intelligence to know that there was danger in a wire hanging down at one end with the other end attached to a trolley or feed wire charged with electricity, and that the plaintiff (by the exercise of such prudence as a person of his intelligence should have exercised under the circumstances) might have avoided the injury, they must find for the defendant.

"(7) The court instructs the jury that, even though they may believe from the evidence that the defendant company negligently allowed one of its wires to become detached from its poles and come in contact with a wire of the traction company charged with a dangerous current of electricity, and that the plaintiff's injury was caused by this coming in contact with such wire, nevertheless, if they further believe from the evidence that this condition had remained for such length of time as would have enabled the said traction company to discover and remedy it by the exercise of reasonable care in the inspection of its wires, then the negligence of the defendant company is not the proximate cause of the plaintiff's injury, and they must find for the defendant.

"(8) The court instructs the jury that the law regards every injury as the consequence or result of the proximate cause of such injury, and not as the consequence or result of a more remote cause, although but for such remote cause the injury could not have occurred. The proximate cause is not necessarily the nearest cause in point of time or space, but it must be the nearest in causal relation to the injury or result. In other words, the proximate cause is the causing cause. And unless the jury believe from the evidence that some negligent act or omission of the defendant was the proximate cause of the plaintiff's injury; and that such result (namely, the plaintiff's injury) was the natural and probable consequence of such negligent act or omission of the defendant — that is to say, such a result as a reasonably prudent man by the exercise of reasonable prudence might have anticipated as likely to occur in the manner in which it did occur — they must find for the defendant.

"(9) The defendant moves the court to strike out all the evidence adduced by and on behalf of the plaintiff on the ground that there is a material variance between the case stated in the declaration and the case which the evidence adduced by and on behalf of the plaintiff tends to prove, and in this connection also asks the court to instruct the jury that under the pleadings in this case the jury cannot find for the plaintiff upon the evidence adduced by and on his behalf.

"(10) A result or effect which is accomplished by the intervention of some independent force taking advantage of and operating upon a thing, and thus producing a result not the natural and probable effect of the thing itself, is not chargeable in law to the thing so taken advantage of and operated upon by the independent force."

To all of which instructions of the defendant the plaintiff objected; and thereupon the court gave the jury the following twelve instructions:

"(1) The court instructs the jury that if they believe from the evidence that the defendant, the Lynchburg Telephone Company, had erected, and on the 20th day of October, 1903, maintained, on Eleventh street, between Monroe and Taylor streets, in the city of Lynchburg, a telephone system operated for pay, consisting in part of telephone poles planted in and along said Eleventh street, between said Monroe and Taylor streets, and had attached to said

"(2) The court instructs the jury that although they may believe from the evidence that the defendant, the Lynchburg Telephone Company, had constructed and put up its poles and telephone wires along Eleventh street, between Monroe and Taylor streets, before the Lynchburg Traction & Light Company erected and constructed its electric trolley street car system along said Eleventh street, between the streets aforesaid, and that thereafter the Lynchburg Traction & Light Company erected and constructed its said electric trolley street car system, with its trolley wires and feed wires, charged with a heavy and dangerous current of electricity, under or lower than the wires of the said defendant, the Lynchburg Telephone Company, this fact does not absolve the said defendant from the duty to exercise the degree of care and diligence in inspecting and maintaining its own wires, as set forth in instruction No. 1; it being immaterial which system was first constructed in said street.

"(3) The court instructs the jury that if they believe from the evidence that the defendant company, or its agents or employees in charge, knew, or by the exercise of care commensurate with the danger might have known, that one of its wires strung over and along Eleventh street, between Monroe and Taylor streets, had become broken and detached from its proper position on its telephone poles, and had come in contact with, or attached to, one of the heavily charged electric wires of the Lynchburg Traction & Light Company, in such manner as to be liable to be or become charged with a dangerous current of electricity, and in such position as to be liable, by a change of position or otherwise, to injure a child passing along or being in said Eleventh street, then it was the duty of the said defendant company and its agents or employees in charge to remove said wire, and a failure to discharge that duty would be negligence.

"(4) The court instructs the jury that if they believe from the evidence that on the 20th day of October, 1903, one of the wires of the defendant company was detached from its proper position on its pole on Eleventh street, between Monroe and Taylor streets, and came in contact with a wire of the Lynchburg Traction & Light Company, which was charged with a heavy and dangerous current of electricity, and thereby itself became charged with a dangerous current of electricity, and hung down in a lot abutting on Eleventh street so close to the ground, and so near to Eleventh street, as to be easily and readily grasped by a child while passing along or being in said Eleventh street, and that the defendant knew, or by the exercise of care commensurate with the danger could have known, the condition of said wire, and that the plaintiff, while in said Eleventh street, took hold of and was burned and injured by the said wire and the said dangerous current of electricity then being thereon, the law presumes, *prima facie*, that the injury to the said plaintiff was caused by the negligence of the defendant company, and the burden is then on the defendant company to establish that it was not guilty of the negligence which caused the said injury.

"(5) The court instructs the jury that although they may believe from the evidence that the Lynchburg Traction & Light Company was negligent in the construction, maintenance, and inspection of its trolley wires, feed wires, or other wires, passing along and over Eleventh street, between Monroe and Taylor streets, or along and over any other portion of said Eleventh street, yet if the jury further believe from the evidence that the defendant, the

Lynchburg Telephone Company, was also guilty of negligence in constructing, inspecting, or maintaining its own wires, and that the negligence of both companies concurred in producing the injury of the plaintiff, then the defendant company will not be excused from liability for its own negligence by reason of the negligence of the Lynchburg Traction & Light Company.

"In other words, where the evidence proves each of two parties to have been guilty of negligent acts of commission or omission, which acts concurred in causing the injury of another, neither of the said parties can escape liability for his own negligence by showing the negligence of the other.

"(6) The court instructs the jury that any negligence of omission or commission by the employees, agents, or servants of the defendant company in the discharge of their duty is in law the negligence of the defendant company, and must be so regarded by the jury.

"(7) The court instructs the jury that the burden rests upon the plaintiff to show by a preponderance of evidence every fact necessary to hold the defendant liable for the injury complained of. Such evidence must show more than the probability of a negligent act. A verdict cannot be found on mere conjecture, but there must be affirmative and preponderating proof that the negligence of the defendant was the proximate cause of the injury of which the plaintiff complains, or that its negligence concurred with that of the traction company, in producing the injury. But negligence may be established by the evidence of the defendant, as well as the plaintiff.

"(8) The court instructs the jury that, in order to entitle the plaintiff to recover, it must appear by preponderating and affirmative evidence that the negligence of the defendant was the proximate cause of the injury complained of, or that said injury was caused by the concurring negligence of the defendant and the traction and light company.

"(9) The court instructs the jury that even though they may believe from the evidence that the defendant company negligently allowed one of its wires to become detached from its poles and come in contact with a wire of the traction company charged with a dangerous current of electricity, and that the plaintiff's injury was caused by his coming in contact with such wire, nevertheless, if they further believe from the evidence that this condition

"(11) The court instructs the jury that if they believe from the evidence that the plaintiff, F. C. Bokker, is an infant of the age of eight years, then the law presumes him to be incapable of contributory negligence; but this presumption may be rebutted. And if the jury shall believe, from their observation of the plaintiff on the stand and his testimony and other evidence, that he was of sufficient intelligence, capacity, and experience to know the probable danger from the wires upon or near Eleventh street, and his duty to avoid them for his protection, and that he negligently failed to avoid them, then his contributory negligence will bar his recovery.

"(12) The court instructs the jury that, if they find for the plaintiff, they may, in estimating the damages, take into consideration the bodily injury and disability sustained by him, if any, and the permanent or temporary character thereof, and the physical pain and mental anguish of the plaintiff caused thereby, if any, and fix the amount of damage at such sum as will be a just, reasonable, and proper compensation therefor."

To all of which instructions, except the sixth, seventh, ninth, and twelfth, the said defendant objected.

Caskie & Coleman and *P. H. C. Cabell,* for plaintiff in error.

Lee & Howard, for defendant in error.

Opinion by KEITH, P.:

The defendant in error, a little boy eight years of age, was sitting upon a box on the sidewalk of one of the streets in the city of Lynchburg, when, seeing what he supposed to be a string dangling down through the limbs of a tree in an adjacent yard, he put out his hand and grasped it. It proved to be an electric wire belonging to the Lynchburg Telephone Company, which had broken and fallen upon a hook of the Lynchburg Traction & Light Company, and by that means came in contact with a wire of the latter company heavily charged with electricity. The defendant in error was knocked down, his person burned in several places, and his right hand so injured that the first, second and third fingers were cut off close to the knuckle joints.

The jury brought in a verdict for $10,000, but the trial court, deeming it excessive, put the defendant in error upon terms either to accept an abatement of the verdict to $5,000, or have it set aside. The judgment of the court recites that "thereupon the plaintiff, under protest, accepted the said sum of $5,000, and the motion of the defendant is therefore overruled." To the action of the court in refusing to set aside the verdict, the defendant excepted, and the case is now before us to review certain rulings made by the trial court.

The first error assigned is to the action of the court permitting the witness Apperson to testify that Freed, the manager of the Lynchburg Telephone Company, after the accident admitted that the wire with which defendant in error came in contact belonged to the Lynchburg Telephone Company.

It appears that shortly after the accident Apperson, the president of the Lynchburg Traction & Light Company, went to a point at or near the scene of the accident. Mr. Freed, the manager of the Lynchburg Telephone Company, was also there. These men were upon the scene of the accident in the discharge of duties which devolved upon them as the officers of their respective companies, and the answer given to the question was, we think, admissible, not as a part of the *res gestæ,* but because made by an officer in the performance of his duty. 2 Cook on Corp. (4th ed), § 726.

In *Morse v. Conn. Riv. R. R. Co.,* 72 Mass. 450, it is held that in an action against a railroad corporation by a passenger for the loss of his trunk the admissions of the conductor, baggage master, or station master, as to the manner of the loss, made in answer to inquiries in behalf of the passenger, are admissible in evidence against the corporation.

In *Lane v. Boston & Albany R. Co.,* 112 Mass, at page 455, it is held that in an action against a railroad company for the nondelivery of lost freight the declaration of their freight agent that he thought perhaps the Thompsons had got it, made in answer to an inquiry by the consignee, is admissible in evidence against

warping through, and in so doing was driven against the side of the draw, and injured it. In an action brought by the company for the damage the defendant claimed that the plaintiffs had, by long use, licensed vessels to sail through, and offered evidence of declarations made by the draw-tenders at various times when vessels were passing through under sail that they preferred to have them go through in that manner. *Held,* that their admissions were admissible as the declarations of the agents of the company while in the discharge of their duties as such agents.

In the case before us the manager of the telephone company (the general manager of the company, if there be a difference, as he is sometimes spoken of in the evidence) was upon the scene of the accident, and investigating the circumstances connected with it. He was speaking with reference to a matter about which he, if any one, had knowledge — that is, whether or not the wires in question were the property of the company of which he was manager — and he made the statement with respect to their ownership while engaged in the performance of a duty as an officer of the company.

The next assignment of error is to the action of the court in refusing to strike out all the evidence introduced by and on behalf of the plaintiff on the ground that there is a material variance between the case stated in the declaration and the case which the evidence tends to prove.

The declaration, omitting the recitals and mere formal parts, states:

"That on the 20th day of October, 1903, by reason of the carelessness and negligence of the said defendant, its agents and servants, aforesaid, a part of one of its said telephone wires, located in, along, upon, and over said Eleventh street, between Harrison and Wise streets, as aforesaid, at a point on said Eleventh street between said Harrison and Wise streets, to wit, between Monroe and Taylor streets, became detached from its proper location upon the defendant's poles aforesaid, and, by reason of the carelessness and negligence of the said defendant, its agents and servants, aforesaid, came in contact with one or more of the aforesaid wires of the electric railway aforesaid, there located, as aforesaid, and then and there charged, as aforesaid, with a heavy and dangerous current of electricity; and also in contact with the right hand and legs of the said plaintiff, who was then and there in said Eleventh street, at the point aforesaid; and thereby, and by reason of the carelessness and negligence of the said defendant, its agents and servants, aforesaid, the heavy and dangerous current of electricity then and there being upon and passing over the said wires of the said electric railway was conducted to, against, and *through the right hand and legs of* the said plaintiff,

whereby and by means whereof the said plaintiff was greatly shocked, stunned, and rendered insensible, and caused to suffer great bodily pain and anguish, and whereby also the said plaintiff was greatly and painfully burned in and about his legs, and in and about his right hand to such an extent that, it being thereby rendered necessary, the three main fingers (the first, second, and third) of the said plaintiff's said hand were amputated, and he was and is thereby rendered permanently maimed and disfigured, and incapacitated for the performance of the ordinary duties of life and for the performance of manual or clerical labor, and whereby, also, he was caused to suffer great bodily pain and permanent mental anguish and mortification."

The proof shows that the defendant in error had taken a seat upon a box, and that, seeing what he supposed to be a string hanging through the limbs of a tree near the railing, he put his hand through or over the railing, grasped the wire, and was injured. Now, the contention is that that proof constituted a material variance from the averments of the declaration, because it is there stated that the defendant in error was in Eleventh street, while the evidence proves that he was injured by a wire hanging down through a tree and into a yard adjacent to, but not in, Eleventh street. There is no averment in the declaration as to the precise position of the wire. It is nowhere said that it was in Eleventh street. But it plainly appears that, if not in Eleventh street, it was in a position of such proximity to Eleventh street as to have inflicted the injury upon this child, who was at the time in the street. So that, if the plaintiff in error is to escape liability, it must be not upon the ground of a variance between the *allegata and probata,* but because for some other reason the proof does not establish its liability — as, for instance, that the presence of the

In the petition for an appeal it is suggested, and it was urged in argument before the court, that by the testimony of the defendant in error he was "in unlawful proximity to the wire in question." This contention seems to be based upon the idea that while the defendant in error was lawfully in the street his hand was unlawfully thrust through or over the railing; in other words, that the defendant was injured while in the commission of a trespass.

In legal contemplation it may be that any unauthorized entry upon the premises of another whose title extends to the center of the earth downward, and without limit upward, by putting one's hand through or over a boundary fence, is a trespass. It would, however, certainly seem that the trespass had reached its vanishing point when such a trespass was committed by a child eight years of age. The owner of the premises would find it difficult to maintain such a defense if he had knowingly permitted so grievous a danger to exist within reach of a public street, and thereby caused an injury to one incapable of contributory negligence. The proof in this case is that the wire which inflicted the injury belonged to the Lynchburg Telephone Company; that it was a test wire — No. 19; that it had been broken in divers places; that it had been broken in the place where the injury occurred for three days (the little boy who was injured had seen it two days before the accident), and the telephone company had been informed of its condition. These facts fully warranted the court in giving the jury instruction No. 1.

The objection to the second instruction was very properly withdrawn.

The next assignment of error is to the third instruction, the objection to which is stated to be that it assumes facts which should have been left to the jury. We do not so understand the instruction. Every recital of fact in that instruction we understand to have been left to the determination of the jury upon the evidence.

The fourth instruction was objected to because, as claimed, there is no evidence to sustain it; while, as it appears to us, the evidence fully warrants the jury in finding every fact to have been proved upon which that instruction is predicated, and it was the duty of the court to give it if the evidence had a tendency to prove them.

The fifth instruction is plainly right, as are the seventh, eighth, and ninth. The tenth seems to us sufficiently favorable to the plaintiff in error, and is substantially the same as instruction No. 8 asked for by it.

We think, upon the whole case, that there was nothing prejudicial to the plaintiff in error in the rulings of the court upon the instructions, and that the case was in all respects fairly submitted to the jury.

With respect to the evidence, we deem it plainly sufficient to warrant the judgment of the court.

The defendant in error asks us to review the action of the court in requiring him to remit a part of the verdict upon the penalty of having it set aside. He accepted the verdict, and cannot now be heard to question it.

Upon the whole case, we think there is no error, and the judgment is affirmed.

UNITED ELECTRIC LIGHT & POWER CO. OF BALTIMORE v. STATE, TO USE OF LUSBY ET AL.

Maryland Court of Appeals — March 21, 1905.

100 Md. 634, 60 Atl. 248.

1. DEATH FROM CONTACT WITH BROKEN TELEPHONE WIRE ACROSS ELECTRIC LIGHT WIRE — EVIDENCE. — In an action for death caused by contact with a broken telephone wire which had crossed a feed wire of the defendant on the night of the accident, evidence that the insulation of certain of defendant's wires was defective at other points and on other occasions than at the point of contact where the accident happened was inadmissible.
2. EVIDENCE AS TO EXPERIMENTS. — A witness should not be allowed to testify to the result of an experiment with a piece of insulated wire supposed to be similar to a feed wire in question, where he was not called as an expert, and stated that he did not testify as an expert.

Appeal by defendant from a judgment for plaintiffs. *Reversed.*

Before MCSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Edgar H. Gans and *C. Baker Clotworthy,* for appellant.

J. C. Boyd, for appellees.

Opinion by BRISCOE, J.:

This suit was brought on the 2d day of December, 1902, in the Baltimore City Court, in the name of the State, for the use of Barbara Lusby, widow, and Henry I. Lusby, infant child, against the appellant and the Chesapeake & Potomac Telephone Company of Baltimore City, to recover damages for the death of Harry H. Lusby, husband and father of the equitable plaintiffs, which is alleged to have been caused by contact with an electric wire charged with electricity, at the corner of Freemont avenue and Portland street, Baltimore. The declaration states that his death was occasioned by the negligence of the defendant in permitting a wire of the Chesapeake & Potomac Telephone Company to break and come in contact with one of the feed wires of the United Electric Light & Power Company, the latter wire being improperly and defectively insulated and heavily charged with electricity; and that the defendants were negligent in permitting the wires to become and remain in a condition dangerous to the lives of persons lawfully using the highways of Baltimore, by reason of which default, wrongful act, and negligence of the defendants, the equitable plaintiffs have lost the services, society, and companionship of their husband and father, and sustained great injury and damage. On the 8th of June, 1904, there was a verdict in favor of the Chesapeake & Potomac Telephone Company under the instructions of the court. On the 10th of June of the same year there was a verdict in favor of the plaintiff against the United Electric Light & Power Company, the appellant here, for $9,000, divided as follows: Six thousand dollars to Barbara Lusby, widow, and $3,000 to Henry Lusby, infant; and from a judgment thereon the defendant has appealed.

The record contains thirteen exceptions, twelve of which relate to the admissibility of testimony offered during the trial, and the thirteenth was taken to the action of the court in refusing to grant the appellant's first, first "a," second, third, fourth, fifth, eighth, and eleventh prayers. It will not be necessary, however, for us to consider in detail all of the exceptions to the testimony offered, because some of them can be considered together.

It appears that the accident in this case happened on the 26th day of November, 1902, about 3 o'clock in the morning, at the corner of Freemont and Portland streets, Baltimore. No one

saw the accident, but the body was found lying on the sidewalk, face downwards, and pointing towards the east, and about four or five feet from the curbstone on Freemont street; a copper telephone wire was wrapped around the body, and he was burned around the neck and left hand. The wire was charged with electricity coming from a feed wire of the appellant company, strung some thirty-five feet above the sidewalk. It appears from the testimony that death was occasioned by contact with the telephone wire, which had become charged with electricity by falling across the feed wire of the appellant company. The telephone wire was found across and in contact with the insulated feed wire of the appellant company.

We do not think that the facts of this case, as disclosed by the record, furnish any ground for the conclusion that the death of the deceased was caused by the negligence of the appellant company. There is a failure of evidence to establish negligence on the part of the company, and there is no evidence to show a failure on its part to perform any duty that it owed to the deceased.

The first, third, seventh, tenth, eleventh, and twelfth exceptions to the admission of evidence are substantially the same, and can be considered together. It was error, we think, to have admitted the testimony set out in these exceptions. The effect of the testimony as introduced was to show that the insulation of certain of the defendant's wires was defective at other points and on other occasions than at the point of contact where the accident happened. There was manifestly no connection between the alleged defects

The fourth, fifth, and sixth exceptions are practically the same, and relate to questions put to the expert witness Lindsay. The questions embraced in these exceptions, we think, were improper, and did not state the necessary facts upon which an expert could base an opinion. They also assumed facts that had not been proven in the case. The objections to these questions have been sustained.

The eighth exception relates to the refusal of the court to allow the witness Russell to testify to the result of an experiment with a piece of insulated feed wire supposed to be similar to the feed wire in question. The witness was not called as an expert, and stated that he did not testify as an expert on the manufacture of insulation or the manufacture of wire. The experiment made by him was entirely too uncertain and misleading to have been submitted to the jury as a test of the resisting qualities of insulation when wet or dry.

There was no error in the ruling of the court in the ninth exception in refusing to admit as evidence a letter-press copy of the record sent to Washington of the general condition of the weather in Baltimore on November 25 and 26, 1902.

This brings us to a consideration of the rulings upon the prayers, which are embraced in the thirteenth exception. The defendant's first prayer, which instructed the jury that under the pleadings there is no evidence in this case legally sufficient to entitle the plaintiff to recover, should have been granted, and the case withdrawn from the jury. In *City Pass. Ry. Co. v. Nugent,* 86 Md. 357, 38 Atl. 779, it is distinctly said, if there be no negligence, though there be an injury, no action will lie. For a mere accident, unmixed with negligence or fault, no action will lie, even though an injury has been done, and no action will lie because there has been no breach of a duty that was owed and therefore no negligence. The case of *W. U. Tel. Co. v. State, Use of Nelson,* 6 Am. Electl. Cas. 210, 82 Md. 312, 33 Atl. 763, 31 L. R. A. 572, 51 Am. St. Rep. 464, relied upon by the appellees, is clearly distinguishable from this case. In that case the evidence showed that the telephone wire had been hanging over the feed wire for two weeks, and the company had notice and an opportunity to mend it. We do not deem it necessary to discuss the rejected prayers presented on the *part of the appellant* company, because

we are all of the opinion, for the error indicated, that the judgment appealed against must be reversed, and, as it is apparent that the appellees are not entitled to recover, a new trial will not be awarded.

Judgment reversed, with costs, without awarding a new trial.

KLOSTERMAN v. UNITED ELECTRIC LIGHT & POWER CO. OF BALTIMORE CITY.

Maryland Court of Appeals — March 22, 1905.

101 Md. 29, 60 Atl. 251.

CONTRACTS. — A contract for electricity for lighting purposes, providing that the electric company is not bound to furnish current during strikes or when unable to secure employees and in other cases expressly mentioned in the application, is not unenforceable by the electric company for want of mutuality.

Appeal by defendant from a judgment for plaintiff. *Affirmed.*

Before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

Emil Budnitz, for appellant.

Alexander Hardcastle, Jr., for appellee.

about June 1, 1902, "or when said current is subsequently supplied," and to pay therefor at the office of the appellee on the Monday of each succeeding week at thirty-five cents per lamp, said lamps to burn from dusk to midnight; no lamps to burn unless notice in writing is given at 30 South Eutaw street by or before 6 o'clock P. M. that the service is required that night. "The subscribers guaranty to pay no less than $470 during the season, whether lamps burn or not." On the said application were printed certain terms and conditions, and it was agreed that these, "so far as they were not inconsistent" with the terms of the application, should be considered as part of the agreement; the whole — that is, the application and the terms and conditions printed thereon — to "form a binding contract between the applicant and the company when accepted in writing by the secretary" of the appellee. This application, signed by the National Coliseum Company, was accepted in writing by the secretary of the appellee. Appended to the application were these words, viz.: "I do hereby guaranty the payment of all bills payable by this contract," signed by "C. Ross Klosterman." Mr. Symington, the secretary of the appellee, testifies that he did not accept the application or sign it until after Klosterman had personally guaranteed it, and that he refused to sign it until it was so guaranteed. On the other hand, Mr. Klosterman testified that the application was signed by the secretary before he had "guaranteed it." It is well settled that in the case of a "collateral promise to answer for the debt or default of another it is necessary that a consideration as well as the promise should appear from the writing." But, as was stated in the case of *Ordeman v. Lawson & Bro.*, 49 Md. 155:

"It is not necessary that the consideration should be stated in express terms, but it is sufficient if it may be collected or implied with certainty from the instrument itself. It frequently occurs that a guarantee is written upon the instrument it professes to guarantee, as when a third party writes upon a promissory note at the same time that the note itself is executed and delivered to the payee a guarantee in these terms, 'I hereby guarantee the within or above note,' or 'I hereby guarantee payment of the within or above note,' and signs it, thus making but one contract; and in such cases the consideration which upholds the note will support the guarantee, and the latter will be good."

In the same case it was held that, when there is no date affixed to the guarantee, so that it is left uncertain whether it may not have been written after the *instrument guaranteed* was executed,

delivered, and received as a complete contract, parol proof may be admitted to show "identity of time;" that is to say, that the guarantee was written and signed at the time of the execution and delivery of the note. The guarantee in this case refers clearly to the contract made by the Electric Light Company with the National Coliseum Company. It guarantees the "payment of all bills payable by this contract." It bears no date, but there was parol evidence to the effect, substantially, that the electric company did not sign or accept the contract until it was guaranteed by Klosterman, and whether it was in fact signed at that time was a matter proper to be submitted to the jury. There was no error, therefore, in granting the appellee's prayer. But it was contended that by a proper construction of the terms of the guarantee there could be no recovery in this case, "because the contract itself offered in evidence is void by reason of the want of mutuality of obligation;" and the court was asked by the defendant's second prayer to so instruct the jury. It is conceded that "on the face" of the contract between the appellee and the coliseum company there is a proposal and an acceptance, but it is alleged that by the conditions annexed to the body of the contract, but forming a part of it, the appellee is under no obligation to furnish the current, though the coliseum is bound to take it and pay for it, and for that reason the contract lacks mutuality. The specific clause supposed to have that effect is the first clause contained in the "terms and conditions," to the effect that the "electric company does not bind itself to furnish current at any par-

the application and the conditions thereto. There was no error therefore, in the rejection of the defendant's second prayer.

The defendant's third prayer was also properly rejected. The balance remaining unpaid of the total amount was an amount due by specific terms of the contract. The guarantee was "the payment of all bills payable by this contract," and therefore, if any part of the $470 was due and unpaid, it was clearly within the legal obligation of the guarantee to have it paid.

The fourth prayer of the defendant states the proposition that, if the contract had been signed by the parties in duplicate, and the secretary and treasurer of the coliseum company had possession of a duplicate copy thereof, and that "after the execution of said contract" the defendant guaranteed in writing the payment of all bills, etc., then the verdict must be for the defendant. This instruction does not submit to the jury to find whether or not the guarantee was made after the contract had been executed and delivered. The correct principle may be stated as follows: If the original debt or obligation be founded upon a good consideration, and at the time when it is incurred or undertaken or before that time the guarantee is given or received, the consideration for the original contract is taken as the consideration of the guarantee; otherwise the consideration for the guarantee must be expressed. *Nabb v. Koontz,* 17 Md. 288. In order, therefore, to render this instruction unobjectionable, there should have been submitted for the consideration of the jury whether the guarantee was entered into after the making and delivery of the contract. In all cases it is not necessary that the consideration for a guarantee should be stated in express terms, provided it can be collected or implied with certainty from the instrument itself. *Hutton v. Padgett,* 26 Md. 231; *Roberts v. Woven Wire,* 46 Md. 374. But must be collected "with certainty;" "not as a mere conjecture, however plausible;" but "a well-grounded inference to be necessarily collected from the terms of the memorandum." *Per* DENMAN, C. J., 35 E. C. R. R. 551. This court said in *Hutton v. Padgett, supra,* "If the consideration can be clearly inferred or gathered from the writing, the statute is gratified." *Deutsch v. Bond,* 46 Md. 169. Here the guarantee is indorsed on the same paper, and refers expressly to the contract. The two together show clearly that the consideration was the connection of

the electric system with the premises of the coliseum. The guarantee must be regarded as a part of the original contract made with the same understanding, even though the contract may have been signed prior in time to the guarantee. The fourth prayer was therefore properly rejected.

There being no error in the rulings of the court below the judgment will be affirmed.

Judgment affirmed.

KREMER v. NEW YORK EDISON COMPANY.

New York Appellate Division, Second Department — March 24, 1905.

102 App. Div. 433, 92 N. Y. Supp. 883.

INJURY TO ONE EMPLOYEE FROM EXCESSIVE CURRENT FURNISHED AN ELECTRICAL MACHINE BY ANOTHER EMPLOYEE — LIABILITY OF MASTER WHERE THERE IS NO AUTOMATIC CURRENT BREAKER — DAMAGES. — In an action brought to recover damages for personal injuries sustained by the plaintiff, it appeared that he was employed as an oiler at the D. street station. And that one B. was employed in the 121st street station; that on the night of the accident B. turned a wrong switch, thus transmitting an electrical current of an excessive voltage to a machine in the D. street station, which current caused the latter machine to fly into pieces, some of which struck and injured the plaintiff. It appeared that the machine in question was fitted with a current breaker which was not automatic in its action; that the presence of an automatic current breaker would have prevented the accident, and the evidence was sufficient to warrant a finding that automatic current breakers were in general use on similar machines. It was held that a judgment in favor of the plaintiff should be affirmed. And that a verdict for $10,000 was not excessive.

breakers, suitable to be used in connection with machines similar to the one involved here, were in general use, and, if so, whether the defendant was negligent in not so equipping this machine. Two witnesses for the plaintiff testified that such an appliance was in general use. One of these, however, derived his knowledge solely from reading, and the other, on cross-examination, testified that he had actual knowledge of only one plant using as high a voltage as 6,600, where such appliance was used, but he knew of several where over 5,000 voltage was employed. Three experts were called by the defendant, the effect of whose evidence was that such appliances were in practical operation where the voltage did not exceed 2,000, but were in an experimental state so far as being adjusted to a current of higher potential than 2,000 volts. Their evidence also was that the working capacity of the machine in question was from 300 to 350 volts on the alternating side, and 240 volts on the direct current side. The evidence of the plaintiff's witnesses was to the effect that this accident could not have happened had the machine been equipped with a breaker adjusted to work automatically, or with a fuse on the direct current side; and it may be said that the plaintiff's theory that the excess current entered the machine from the "D. C." side is supported by the evidence of the defendant's own witnesses to the effect that a current of 6,000 voltage would instantly have blown out the fuse on the alternating side, which was found to be intact after the accident.

The plaintiff and Brinkman, whose act in turning the wrong switch produced the condition resulting in the accident, were engaged at different stations, in separate and distinct employment, in which the plaintiff had neither the means nor the opportunity of knowing either the character of the work performed by Brinkman, or his competency to do it. Conceding, for the purpose of the argument, that Brinkman's act was culpably negligent, and assuming, without deciding, that, notwithstanding the peculiar circumstances of this case, he was so far the fellow servant of the plaintiff as that the defendant was not bound to anticipate or guard against the consequences of his negligence, this judgment may nevertheless be supported. Of course, except that furnished by the occurrence itself, there is no direct evidence of any cause likely to produce an overcharge of current in this machine, which,

consistent with the above assumption, the master was required to anticipate and guard against. But it is conceded not only that devices and circuit breakers, not automatic, were in general use, but that they were used by this defendant to break the circuit when the current reached a potential higher than the point of safety. It may fairly be inferred from the evidence of experts of both parties that such devices were necessary to insure any degree of safety in the generation and use of these extremely dangerous electric currents, and the evidence warranted the jury in finding that the defendant, in the exercise of reasonable care, should have anticipated that a dangerous overcharge of current in this machine was likely to occur from a variety of causes, other than the negligence of plaintiff's fellow servants. The plaintiff complains because the device used was not suitable, and because, in fact, it was not used at all on the side of the machine from which the current causing the accident entered; and the suggestion of the defendant that there was no proof that it was practical or necessary to have a breaker on the direct current side is met by the testimony of its own witness to the effect that the breakers installed at the Duane street plant were in fact direct current circuit breakers. If the defendant should have apprehended and guarded against the occurrence from any cause, its failure to do so constituted negligence, and a recovery cannot be defeated by the fact that in the particular case the overcharging which it was bound to guard against was produced by a cause which it was not bound to anticipate, to wit, the negligence of plaintiff's fellow servant. Its negligence consisted in not having furnished a reasonably safe appliance, and the fact that in the particular case the negligence of the co-servant concurred to produce the injury does not deprive the plaintiff of his remedy for the defendant's wrong, as "the negligence of a servant does not excuse the master from liability to a co-servant for an injury which would not have happened had the master performed his duty." *Coppins v. N. Y. C. & H. R. R. Co.*, 122 N. Y. 557, 25 N. E. 915, 19 Am. St. Rep. 523, and cases cited.

But it is said that the negligent act of Brinkman in turning in the wrong switch, and not the failure to supply an automatic current breaker, was the proximate cause of the accident. This conclusion is based on the reasoning in cases where the question

determined was whether some independent agency had intervened to break the causal connection between the cause alleged and the result. The defendant had a series of generating plants, so connected that currents of 6,600 voltage could be transferred from one station to another, as the demand upon the different stations varied. The plaintiff, having no duty to perform except to oil the engines at the Duane street station, a fellow servant of Brinkman employed at the 121st street station only in the sense that he was employed by the same master, unconscious of danger, and with no means of warning, received the grievous injury complained of, because, as the jury have said, the master failed to provide reasonably safe machinery at the place where the injury was received. But because the current causing the injury was set in motion by the act of a fellow servant employed as remotely from the plaintiff, in practical effect, as though separated by the maximum distance possible for electricity to travel, it is urged that the negligence of the fellow servant, and not that of the master, was the proximate cause of the injury. The same reasoning would prevent a recovery in every case of failure on the part of a master to discharge his duty in the adoption of safety appliances designed only as preventives. Of course, the absence of the circuit breaker could not, in a literal sense, be said to have been the cause of this accident. Its presence, however, would have prevented it, and its absence, being a breach of duty on the part of the master, was a juridical cause. The negligence of the master was continuous, and harmless until a dangerous condition was produced; but the cause producing such condition, instead of intervening to break the causal connection between such negligence and its effect, merely concurred with it to produce the effect. *Coppins v. N. Y. C. & H. R. R. Co., supra; Stringham v. Stewart,* 100 N. Y. 522, 3 N. E. 575; *Cone v. D., L. & W. R. Co.,* 81 N. Y. 206, 37 Am. Rep. 491; *Ellis v. N. Y., L. E. & W. R. Co.,* 95 N. Y. 551; *Phillips v. N. Y. C. & H. R. R. Co.,* 127 N. Y. 657, 27 N. E. 978; *Quill v. Empire State Tel. & Tel. Co.,* 6 Am. Electl. Cas. 303, 92 Hun, 546, 34 N. Y. Supp. 470, 37 N. Y. Supp. 1149.

I do not think that the defendant can complain of the charge. For reasons already stated, it was not error to submit to the jury the question whether there was a fuse on the direct current side

of the machine, and the other portion of the charge challenged in this court does not present ground for reversal. The court did not submit the question of Brinkman's negligence to the jury, but clearly pointed out that the plaintiff's right to recover depended solely on the question as to whether the defendant should have apprehended such a condition as resulted, and guarded against it. What the court said as to Brinkman was only illustrative of the question which the court was discussing, viz., whether, in the exercise of reasonable prudence, the defendant should have anticipated that an overcharge of current might enter this machine. It is apparent that the verdict was not made to depend in the slightest upon the character of Brinkman's act. The court distinctly charged that the defendant was not bound to anticipate or guard against the possibility that any fellow servant would negligently turn the wrong switch. The effect of the whole charge was that if the defendant, in the exercise of reasonable care, should have apprehended that, from some cause not the result of negligence of the plaintiff's fellow servants, an overcharge of current was likely to enter this machine, and failed to use reasonable care to guard against it, the plaintiff could recover, irrespective of what did in fact produce the overcharging. It is true that in the colloquy with counsel, after several requests had been made and passed upon, the court said: "I proceeded on the assumption that this man handled the switch with due care, but, in a moment of forgetfulness, made a mistake." This remark was not addressed to the jury; no exception was taken to it, and I do not think the jury could have been misled by it. It is difficult to understand how a jury could have been confused by a charge remarkable for its clearness and simplicity, or how they could have been led to think that the defendant was liable for the act of Brinkman, when, in plain and concise language, their attention was directed to the sole question upon which the defendant's liability depended.

The verdict is a large one. But considering the age of the plaintiff, his earning capacity at the time of the accident, the different operations which he had to undergo, with the attendant pain and suffering, and the grievous character of the injury, which the defendant did not attempt to controvert, we cannot, without invading the province of the jury, say that it was excessive. These conclusions lead me to vote for affirmance of the judgment and order appealed from.

HIRSCHBERG, P. J., and RICH, J., concur.

WOODWARD, J. (dissenting).

The plaintiff, a man about 34 years of age, was employed by the defendant in its Duane street electric lighting station, as an oiler of machinery, on the 20th day of June, 1901. He had been in such employ from November, 1899. At about 7 o'clock in the evening of the 20th of June, while in the discharge of his duties, he noticed that a machine known as a "commutator," or "rotary converter," had become red-hot, and this was followed by pieces of copper and iron being thrown about the room. He attempted to run away after being hit by a piece of the copper, but was struck by a piece of iron on his leg, and the leg was cut off. An examination after the accident showed that the commutator had, by some action of the electric currents, been heated to such an extent that the motion of the machinery caused it to fly to pieces, with the result to the plaintiff above stated. Upon the trial it was developed that the defendant has a series of electric lighting stations, connected by a main cable inclosed in a conduit; and it was customary, after the down-town places had been closed, to connect the Duane street station with the up-town plants, to aid in furnishing the current to residences, etc. On the evening in question one Harry L. Meyers, foreman of the 121st street station, telephoned the Duane street station for more power to meet the up-town demand; and, having made his arrangements, he sent one Brinkman, who is conceded to have been a competent man, to the high-tension switchroom to switch in "No. 6,601 feeder." Instead of doing this, Brinkman put in the wrong switch, which was followed by an electric display in the 121st street station which threw Brinkman down a flight of stairs and threatened to do much damage. Mr. Meyers took steps to prevent the local damage, and then examined the switch board, which he found in a condition which he says would result in a short circuit in the Duane street converter, and produce the accident for which the plaintiff seeks damages. This explanation of the accident appears to be fully conceded, and it would seem, under the authorities in this state, that, as it was due to the negligence of a fellow servant, who is conceded to have been a competent man, the plaintiff is without a remedy. The defendant's motion to dismiss upon the ground that the plaintiff had failed to establish facts sufficient to constitute a

cause of action, and that the action was due to the negligence of a fellow servant, was, however, overruled; and the principal question litigated and submitted to the jury was whether the defendant was negligent in not providing its machine in the Duane street station with automatic current breakers or fuses, which it is claimed would have made the accident impossible. The jury, under a charge which submitted practically but this one question, has found a verdict for the plaintiff, resulting in a judgment for something over $20,000, and the defendant appeals to this court.

It was not disputed that the defendant had equipped its machine with current breakers, and that it had a competent man on hand to operate such current breakers, but there was a dispute in the evidence whether there was not a better contrivance — an automatic current breaker — which was in more or less general use; and this question was fully litigated, with the result that the jury has found that the defendant was negligent in not providing this automatic current breaker, or in not having an approved fuse upon both sides of the machine. But it seems to me that all of this part of the testimony is wholly immaterial, from the fact that the lack of these contrivances was not the proximate cause of the plaintiff's injury. If the accident had been initiated by the defendant, or if it had been due to the neglect of the defendant in furnishing proper appliances at the station where Brinkman was employed, or if it had been caused by the falling or crossing of the wires, where such accident was likely to happen, and where reasonable foresight and prudence would have suggested such a result, it might be important to determine the question of defendant's negligence at the Duane street station; but, under the conceded facts in this case, the question of whether the defendant had proper safeguards about its machine in the Duane street station is of no importance, because the failure to have these appliances was not the proximate cause of the injury, nor was it a cause concurring with any antecedent negligence on the part of the defendant. The plaintiff would not have been injured, except for the negligent act of a fellow servant engaged at the 121st street plant. There is no suggestion that the injury would have occurred, except for the fact that the plaintiff's fellow servant disregarded his orders and turned on the wrong switch; and, as it was no part of the defendant's duty to anticipate that a competent man would

disregard his instructions in dealing with the proper appliance which had been provided, it did not owe the plaintiff the duty of making it impossible that an accident should result from such negligence on the part of Brinkman. The test of negligence is not whether it was possible to prevent an accident, but whether the defendant, under the circumstances, owed the duty of preventing an accident which would not have occurred except for the negligence of a fellow servant. The duty to provide a reasonably safe place in which the servant is to labor — the duty to provide reasonably safe tools and appliances — do not charge the master with liability for an accident which occurs to the servant, unless the particular accident results because of a neglect of these duties. The master's negligence must be the proximate cause, not a mere incident in a chain of events set in motion by some one for whom the master is not responsible. There is no suggestion that this particular accident would have happened except for the carelessness of Brinkman, and the fact that the defendant had not anticipated this carelessness and made it impossible for the plaintiff to be injured does not, in my opinion, constitute actionable negligence on the part of the defendant, who was liable only for negligence which should be the proximate cause of the injury. It may be conceded that, if the defendant's cables connecting its several stations had been exposed to the danger of contact with other wires carrying heavy currents of electricity, it would have been its duty to have provided the best practical appliances, and it might have been liable if it had failed to do this, and an accident had resulted from contact with other wires; but it does not follow that, if the accident had resulted from the negligence of a fellow servant in misplacing a switch, the same liability would follow, for it is not the duty of the master to provide against the errors of competent servants, at least in so far as this duty relates to fellow servants.

This much upon the reason of the case. The authorities, I believe, sustain the propositions above set forth. "The proximate cause," say the court in *Insurance Co. v. Boon,* 95 U. S. 117, 130, 24 L. Ed. 395, "is the efficient cause — the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the *responsible ones,* though they

may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster."

In the case of *The G. R. Booth,* 171 U. S. 450, 458, 19 Sup. Ct. 9, 43 L. Ed. 234, the court cites with approval the language of the court in *Milwaukee & St. Paul Railway v. Kellogg,* 94 U. S. 469, 24 L. Ed. 256, in reference to what constitutes the proximate cause, as follows:

"The inquiry must always be whether there was any intermediate cause, disconnected from the primary fault, and self-operating, which produced the injury."

The court continues:

"In the present case the burning of the city hall, and the spread of the fire afterwards, was not a new and independent cause of loss. On the contrary, it was an incident — a necessary incident and consequence — of the hostile rebel attack on the town; a military necessity caused by the attack. It was one of a continuous chain of events brought into being by the usurped military power — events so linked together as to form one continuous whole."

In *Goodlander Mill Co. v. Standard Oil Co.,* 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583, 586, a proximate cause is defined as follows:

"The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred."

And the same court say:

"The remote cause is that cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof. The absence of the valve was doubtless, in a sense, a cause of the injury — an antecedent cause; but, where the negligent act is not wanton or *malum in se,* the law stops at the immediate, and does not reach back to the antecedent, cause."

The failure of the defendant to install an automatic current breaker was not negligent, in so far as it relates to the accident now under consideration, because the failure to have such a current breaker was but the remote cause of the accident; and the defendant was not bound to anticipate carelessness on the part of competent servants, any more than a railroad company is bound, in behalf of its employees, to anticipate that engineers and conductors will misunderstand or disregard the orders under which trains are operated. The rule which I conceive governs in the present case is that:

"Although there may have been such an act or omission as would have rendered the defendant liable, had damages proximately resulted therefrom, yet, if they did not proximately so result, the defendant is not liable, though the plaintiff is damaged, and though such damages would not have resulted but for the act or omission complained of." 21 Am. & Eng. Enc. of Law (2d ed.) 495, and authorities cited under note 2.

Assuming that it would have been negligent for the defendant to operate its machine without an automatic current breaker if the damages had been caused by its primary negligence, there is no justice in holding the latter liable where it had discharged its duty in providing competent fellow servants, and the accident results from the carelessness of such servants. The proximate cause is "that which immediately precedes and produces the effect." *Hoffman v. King,* 160 N. Y. 618, 629, 55 N. E. 401, 46 L. R. A. 672, 73 Am. St. Rep. 715; *Trapp v. McClellan,* 68 App. Div. 362, 365, 71 N. Y. Supp. 130. As there was no dispute as to the original cause of the accident, the question of the proximate cause was one of law, to be determined by the court (*Hoffman v. King,* 160 N. Y. 628, 55 N. E. 403, 46 L. R. A. 672, 73 Am. St. Rep. 715), and it was error to submit the case to the jury.

I am of opinion that the charge of the learned trial court, as modified, constituted error calling for a reversal of the judgment. The court, after stating that the defendant was not bound to anticipate the mere possibility of an accident, added:

"But if, in the imperfection of human hands and human eyes and human people, as we employ them and as we know them, by mistake, by drowsiness, by anything that pertains to the natural imperfection of man — if, considering that, you find that an error like this of a man in 121st street was a probable error, or an error likely to occur; that would misdirect these currents and cause the thing like this — then you may find it was something that, in reasonable prudence, should have been guarded against."

Obviously this is not the law, for it makes the master liable for the negligence of competent fellow servants. Defendant objected to this portion of the charge, and the court modified it by saying, "I mean by some rule or regulation, or some apparatus or machinery," and defendant objected to the charge as modified. Subsequently defendant's counsel read his fourth request to charge, granted by the court, as follows:

"In considering whether the appliances furnished by it were reasonably safe, the defendant was entitled to rely upon and expect the exercise of reasonable care on the part of its employees, and was not bound to anticipate

or guard against the possibility that any fellow servant of the plaintiff would negligently turn the wrong switch."

This might have been construed to have corrected the error in the main charge, but the learned court commented:

"I charge that, and meant to keep close to that in my charge. It may possibly be I went a little beyond it, although I had no intention of doing so. I mean that the company has a right to presume that the other employees will be reasonably careful; and the things that happen in the best regulated families, as it is said, outside of that which causes danger, and so on — I mean the things that happen although reasonable care and prudence were exercised by the employees."

This, it seems to me, could have no other effect than to confuse the jury. There was no evidence in the case, so far as I am able to discover, that there was any defect in the switch board at the 121st street station; that there was any drowsiness or other imperfection on the part of Brinkman — certainly none for which the defendant was in any manner responsible — and the charge, as it was finally completed to the jury, must have left them with the impression that they had a right to find that in some way the master was liable to the plaintiff for the act of Brinkman. Unless the defendant was responsible for his acts, there could be no relation of the defendant to the proximate cause of the injury; and, if the question was to go to the jury at all, it was important that the law should be stated with great clearness. If the evidence had warranted the jury in finding that the defendant, though originally discharging its duty in the employment of a competent fellow servant, had imposed such duties and had required

HEIDT v. SOUTHERN TELEPHONE & TELEGRAPH CO. ET AL.

Georgia Supreme Court — March 25, 1905.

122 Ga. 474, 50 S. E. 361.

1. LIABILITY OF TELEPHONE AND ELECTRIC LIGHT COMPANIES WHERE WIRE OF FORMER FALLS ACROSS WIRE OF LATTER. — Where a telephone wire is broken by a storm which could not have been anticipated or reasonably foreseen, and falls upon an electric light wire which is charged with a heavy and dangerous current of electricity, and which has become grounded by the falling of a tree from the effects of the same storm, the liability of the owners of the respective wires depends upon the negligence in the construction and maintenance of the wires, where the injury occurs immediately after the falling of the wires, and neither company has a reasonable time to discover and remove the danger.
2. ORDINANCE GOVERNING CROSSING OF TELEPHONE WIRES AND ELECTRIC LIGHT WIRES — CONSTRUCTION. — An ordinance granting a franchise to a telephone company to construct and maintain its lines upon the streets and alleys of a city, which provides that, wherever it is necessary for the telephone wires to cross any electric light wire, a space of not less than three feet shall be preserved between the former and the latter, and, if it shall be necessary to raise or lower the wires in order to preserve the distance, the expense thereof shall be borne by the company doing the latest construction, and proper guards are to be placed and maintained (assuming its reasonableness), imposes the duty of erecting and maintaining guards upon the company doing the latest construction.
3. SAME — QUESTION FOR JURY. — Where the undisputed evidence shows that, at the point of crossing where the alleged contact of wires occurred, the electric light company first constructed its wires, the ordinance was not applicable to the electric light company; and its reasonableness or unreasonableness was not an issuable fact as to it, and the plaintiff has no cause of complaint of the submission of such issue to the jury.
4. DEFECTIVE INSULATION — PROXIMATE CAUSE. — If the abrasion of the insulation of the electric light wires alleged in the petition was not a proximate or efficient cause of the injury, such want of insulation would not be a basis of the plaintiff's recovery.
5. JOINT AND SEVERAL TORTFEASORS — NEW TRIAL. — Where joint and several tortfeasors are sued in the same action, and a recovery is had against one, errors peculiarly affecting the liability of the one against whom the verdict was found, and which do not affect the liability of the other, are not a ground for the granting of a new trial to the plaintiff as to the one in whose favor the verdict is rendered.
6. SAME — EVIDENCE. — As to the defendant company, which the jury by its verdict absolved from liability for the tort complained of, the evidence did not demand a finding in favor of the plaintiff.

(Syllabus by the Court.)

Ordinances. — As to the construction of ordinances governing electric companies, see note to *Davenport Gas & Electric Co. v. City of Davenport, ante.*

Error by plaintiff from judgment rendered. *Affirmed.*

Leon A. Wilson, Jno. W. Bennett, and *Toomer & Reynolds,* for plaintiff in error.

Osborne & Lawrence, J. L. Sweat, and *W. G. Brantley,* for defendants in error.

Opinion by EVANS, J.:

About 7:45 o'clock on the night of May 15, 1902, Redding E. Heidt, while walking upon the sidewalk on the northeast side of Jane street, in the city of Waycross, came in contact with a telephone wire lying upon the sidewalk. This wire was charged with a powerful current of electricity. Heidt was knocked down, and, as a result of the shock and the burns he received, he subsequently died. His widow, Amelia Heidt, brought an action for damages against the Southern Telephone & Telegraph Company and the Satilla Manufacturing Company, alleging that the death of her husband was brought about by their negligence, the telephone wire having been charged with a deadly current of electricity by reason of the fact that it had been allowed to come into contact with the wires of the Satilla Manufacturing Company, which owned and operated an electric lighting system in the city. The plaintiff sought to recover damages in the sum of $30,000; averring that her husband had been earning $103.50 per month as foreman of the shops of a railway company, and might reasonably have expected promotion to a position paying $150 per month or more.

and (5) that at the point of contact the Satilla Manufacturing Company had run its wires through and against a small sycamore tree, thus causing them to be rubbed and chafed by the branches of the tree, and the insulation to be worn off. The telephone company was alleged to have been guilty of negligence, in that (1) it failed to erect and maintain suitable guard wires or other devices to keep its wires from coming into contact with the lighting wires; (2) its wires on Jane street were loosely and carelessly drawn through the tops of trees and against their branches, and were thus exposed to constant strain by the swaying of the wires and the limbs of the trees; (3) the telephone posts were placed 170 feet apart, whereas ordinary prudence required that they should be not exceeding 120 feet apart, the wires strung along them being too small and weak to stand the strain imposed upon them when connected with poles 170 feet apart; and (4) at the point where the contact occurred the telephone wires were placed "across, above, and within a dangerous and unlawful distance of the electric lighting wires of the Satilla Manufacturing Company — that is to say, at a distance ranging from six inches to two and a half feet above said wires." The plaintiff further charged that the defendant companies were concurrently negligent in thus erecting and maintaining their wires at the point where the contact occurred, and either had actual notice of the condition of affairs at that point, or could have known thereof by the exercise of ordinary prudence, and that their negligence in this respect was the proximate cause of the death of her husband, and they were jointly and severally liable to her; the death of her husband being attributable to no fault on his part.

By way of an amendment to her petition, the plaintiff alleged that she was unable to state in what manner the telephone wire became disconnected and fell across the sidewalk, but that the proximate cause of the injury sustained by her husband was the defendants' violation of a valid municipal ordinance of the city of Waycross, adopted on December 29, 1896, which provided that:

"Whenever it is necessary for the telephone wires and any electric wires in said city to cross each other, a space of not less than three feet shall be preserved between the former and the latter; and if it shall be necessary to raise or lower the wires in order to preserve the distance, the expense thereof shall be borne by the company or party doing the latest construction; and appropriate guards are to be placed and maintained in manner just hereinbefore stated."

Both companies were charged with being concurrently and severally negligent in maintaining their wires at a distance apart which was less than that prescribed by this ordinance, and in permitting their wires to come into contact, so that the wire which fell across the sidewalk became charged with a deadly current of electricity.

The telephone company filed an answer in which it denied that it was guilty of the acts of negligence charged against it, and averred that the death of the plaintiff's husband was the result of an act of God; there having been "a mighty storm which broke over the city of Waycross on the evening of May 15, 1902, with irresistible force, and which, in its progress, broke the wires of this defendant's telephone system, and, before defendant knew of the break or had a reasonable opportunity to learn of the same, the injury to the deceased occurred." In answer to the allegations set out in the amendment to the petition, the telephone company averred that the municipal ordinance referred to "was intended only to require the wires of telephone and electric companies to be suspended and maintained in such manner that electricity could not escape by induction from one wire into another, and that, if the said ordinance bears the construction that guard wires or any other kind of guard or device [must be erected] to prevent contact between one wire and another where they cross, in the event of a break or parting of wires, [it] is void, because it is unreasonable, and provides an impossible, unnecessary, and dangerous requirement."

systems for the transmission of electricity upon and over public highways owe to the public the duty of properly constructing and maintaining their respective wires and poles. They are bound to provide such safeguards against danger as are best known and most extensively used, and all necessary protection must be afforded to avoid casualties which may be reasonably expected. *Higgins v. Cherokee Railroad,* 73 Ga. 164; *Davis v. Augusta Factory,* 92 Ga. 712, 18 S. E. 974. They are not insurers against accidents, but are bound to use reasonable care, proportioned to the danger of injury. In determining whether proper care and diligence in construction or maintenance has been observed, not only the physical structure of wires and poles must be considered, but also the use to which it is to be put, its remoteness or proximity to travelers on the highway, the nature of the electrical current which is to be transmitted over the line, the relative position of other lines, and all other circumstances affecting the case. The electric light company and the telephone company both contend that the evidence demonstrates that the homicide for which the plaintiff sued was attributable to accident, and not to any remissness of duty on their part. Inasmuch as the plaintiff obtained a verdict against the telephone company, and a new trial is asked because the jury exonerated the electric light company from all blame, it is not deemed necessary to refer to the complaints of negligence of the telephone company, except as its negligence may have been concurrent with that charged against the electric light company.

One of the plaintiff's contentions was that the electric light company had failed to erect and maintain proper guards or other appropriate protecting devices between its lighting wires and the wires of the telephone company. There were neither guard wires nor any protecting device between the wires of the two companies. Expert evidence as to the efficacy of such means of protection was submitted, and seemed to preponderate with the conclusion that guards did not lessen the danger of contact, and were not usually employed in electrical construction under similar conditions. Whether the failure to erect and maintain guards or other devices between the electric light wires and the telephone wires constituted negligence was a question of fact for the jury. "In the present condition of the science and of the practical knowledge on this subject, it cannot be said, as matter of law, what method of guard-

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The telephone company filed an answer in which it denied that it was guilty of the acts of negligence charged against it, and averred that the death of the plaintiff's husband was the result of an act of God; there having been "a mighty storm which broke over the city of Waycross on the evening of May 15, 1902, with irresistible force, and which, in its progress, broke the wires of this defendant's telephone system, and, before defendant knew of the break or had a reasonable opportunity to learn of the same, the injury to the deceased occurred." In answer to the allegations set out in the amendment to the petition, the telephone company averred that the municipal ordinance referred to "was intended only to require the wires of telephone and electric companies to be suspended and maintained in such manner that electricity could not escape by induction from one wire into another, and that, if the said ordinance bears the construction that guard wires or any other kind of guard or device [must be erected] to prevent contact between one wire and another where they cross, in the event of a break or parting of wires, [it] is void, because it is unreasonable, and provides an impossible, unnecessary, and dangerous requirement."

systems for the transmission of electricity upon and over public highways owe to the public the duty of properly constructing and maintaining their respective wires and poles. They are bound to provide such safeguards against danger as are best known and most extensively used, and all necessary protection must be afforded to avoid casualties which may be reasonably expected. *Higgins v. Cherokee Railroad,* 73 Ga. 164; *Davis v. Augusta Factory,* 92 Ga. 712, 18 S. E. 974. They are not insurers against accidents, but are bound to use reasonable care, proportioned to the danger of injury. In determining whether proper care and diligence in construction or maintenance has been observed, not only the physical structure of wires and poles must be considered, but also the use to which it is to be put, its remoteness or proximity to travelers on the highway, the nature of the electrical current which is to be transmitted over the line, the relative position of other lines, and all other circumstances affecting the case. The electric light company and the telephone company both contend that the evidence demonstrates that the homicide for which the plaintiff sued was attributable to accident, and not to any remissness of duty on their part. Inasmuch as the plaintiff obtained a verdict against the telephone company, and a new trial is asked because the jury exonerated the electric light company from all blame, it is not deemed necessary to refer to the complaints of negligence of the telephone company, except as its negligence may have been concurrent with that charged against the electric light company.

One of the plaintiff's contentions was that the electric light company had failed to erect and maintain proper guards or other appropriate protecting devices between its lighting wires and the wires of the telephone company. There were neither guard wires nor any protecting device between the wires of the two companies. Expert evidence as to the efficacy of such means of protection was submitted, and seemed to preponderate with the conclusion that guards did not lessen the danger of contact, and were not usually employed in electrical construction under similar conditions. Whether the failure to erect and maintain guards or other devices between the electric light wires and the telephone wires constituted negligence was a question of fact for the jury. "In the present condition of the science and of the practical knowledge on this subject, it cannot be said, as matter of law, what method of guard-

ing the wires shall be required, nor whether any guards shall be required, for it is not known to the law that any method now known will prove effective. But it is a question for the jury, under all the facts in the case, to determine whether the method actually used was negligent." *Block v. Milwaukee St. R. Co.* (Wis.), 5 Am. Electl. Cas. 293, 61 N. W. 1101, 27 L. R. A. 368, 46 Am. St. Rep. 849. The court, in an appropriate charge to the jury, submitted this issue, and left it to the jury to determine from the evidence whether proper construction demanded the employment of guard wires or other devices between the wires of the two companies.

The other acts alleged as negligent construction, such as the location of the transformer, the insulation of the wires, the proximity of the wires of the telephone company, the running of the wires through the branches of a shade tree, were also submitted to the jury under appropriate instructions. There was evidence tending to show that the electric light company was not negligent in any of these particulars.

The homicide occurred within thirty minutes after the light wire was grounded by a tree falling across it. There is no complaint in the petition that either company knew of the disarrangement of the wires, or that this condition had existed such a period of time that the companies, in the exercise of reasonable diligence, could have had knowledge of the danger, resultant from the fallen wires. The evidence warranted a finding that the electric light company had observed due care in the construction and mainten-

Cas. 245, 22 S. E. 767, 31 L. R. A. 577. The various instructions of the court which embodied the principles announced in the first headnote were not erroneous.

2, 3. The plaintiff alleged that the ordinance requiring the erection and maintenance of guards, and preserving a distance of not less than three feet between the wires of the two companies at crossing points, imposed a joint duty on both the telephone company and the electric light company to maintain the guards, and to preserve that distance between their wires, and that a failure to comply with the ordinance constituted negligence *per se.* The fourth section of the ordinance, which is relied on as establishing this duty, is embodied in the statement of facts. The caption of the ordinance was as follows:

"An ordinance granting to the Southern Telephone & Telegraph Company, their associates, successors, and assigns, the rights and privileges of erecting and maintaining telephone poles and wires within the corporate limits of the city of Waycross and operate a telephone exchange."

This ordinance gave municipal assent to the telephone company's erection of its telephone system over, along, and upon the streets and alleys of the city. It also imposed burdens upon the telephone company, and in this respect it amounted to more than a contract granting a franchise, and was an exercise of the right of municipal legislation. It therefore has the force of law within the corporate limits. *Hayes v. Mich. Cen. R. Co.,* 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410. The manifest purpose of the ordinance was to require, at points where the telephone wires crossed an electric light wire, a distance of three feet to be preserved between the wires of the two companies, and that proper guards should be maintained to prevent contact between the wires. The rights of the electric light company, which the evidence shows had previously constructed its system, were recognized by the provision in the ordinance that the cost of raising or lowering its wires, if necessary, and the erection and maintenance of guards, should be borne by the telephone company, as the "party doing the latest construction;" and the ordinance further contemplated that, should the electric light company subsequently extend its line or change its course so that it crossed over or under the wires erected by the telephone company, the expense of raising or lowering its wires and erecting and maintaining guards should fall

upon the electric light company, as the company doing the latest construction, and thus rendering this expense necessary. That is to say, the intent was to impose upon the company doing the latest construction the duty of meeting the requirements and observing the precautions stated in the ordinance. If that company failed to comply with the ordinance, then the city could compel its observance by having the work done at the company's expense; but the other company, being under no duty to erect or maintain guards, could not likewise compel a compliance with the terms of the ordinance, but would have to rely upon the city to enforce it. We construe the ordinance to mean that the duty of erecting and maintaining guards between the wires was imposed on the company doing the latest construction. In one instance this duty might fall on one company, and in another instance upon the other company, according to the priority of construction at the crossing point. There being no dispute in the evidence that the electric light company's wires were first erected at the point of alleged contact, the ordinance was inapplicable to it, so far as this case was concerned. Relatively to the electric light company, noncompliance with the ordinance at the point where the telephone wires were stretched above its wires at the transformer pole was not negligence *per se;* nor could that company be held responsible for the injury unless reasonable care demanded that the precautions prescribed in the ordinance should have been observed, and the electric light company was negligent in maintaining and using its wires under the existing conditions at that point. Therefore

experts in electrical construction, as more casualties had been occasioned because of their use than would have occurred otherwise, and that they really were a menace, instead of a protection, to persons passing along the streets of a city where wires carrying a high current of electricity passed under or above the wires of a telegraph or telephone company.

4. In her petition the plaintiff alleged that at the point of contact the electric light company had run its wires through and against a small sycamore tree, thus causing them to be rubbed and chafed by the branches of the tree, and the insulation to be worn off. The electric light company offered evidence tending to show that the contact occurred at a point other than where the insulation had been abraded by the branches of the tree.. The evidence as to the precise point of contact was conflicting, and the court charged the jury that if they found from the evidence that, at the point at which the telephone wire fell across the electric light wire, the latter wire was insulated in the usual and customary manner, the fact that the wire of the electric light company may not have been insulated at other points would not constitute negligence upon the part of either of the defendants which would render them liable. This charge cannot be construed into an expression of opinion as to what is or is not negligence. The instruction was nothing more than a statement of the general rule that a defendant is only required to respond to the specific negligence alleged against it, and is not liable for acts of negligence which did not bring about the injury of which complaint is made. The court merely told the jury that, if at the place of contact between the wires there was proper insulation, then the want of insulation at a different place would not be the proximate cause of the injury. The plaintiff in any case must stand or fall by the allegations of negligence alleged in his petition, and will not be permitted to recover because of negligence about which no complaint is made, or which in no way contributed to the injury inflicted.

5. Where two persons are alleged to be joint and several tortfeasors, and are sued in the same action, and a recovery is had against one only of them, errors committed by the court peculiarly affecting the liability of the one against whom the verdict was found, but not affecting the liability of the other, do not afford

cause for granting the plaintiff a new trial as to the one in whose favor the verdict operated. Certain charges of the court are excepted to on the ground that the city ordinance above referred to was ignored, and the jury were, in effect, instructed that, despite this ordinance, if the defendant companies exercised all usual and proper diligence in the erection and maintenance of their respective systems, and the casualty was brought about by a storm of unusual severity, neither of the defendants would be liable to the plaintiff. Complaint is also made that the court told the jury that, as the ordinance provided that the telephone system should be constructed and maintained under the supervision and direction of the city authorities, the presumption would be it was so constructed and maintained, unless the contrary was made to appear. Evidently, while these instructions affected the liability of the telephone company, they did not operate to the prejudice of the plaintiff in so far as the electric light company was concerned, for, as we have already pointed out, it was not bound to observe the municipal ordinance in maintaining its wires and poles on Jane street, having constructed its line along that street before the telephone company erected its system, and the latter company being therefore the one upon which the duty imposed by the ordinance rested.

6. It is earnestly insisted by the plaintiff in error that in no view of the evidence was the jury warranted in exonerating the electric light company from the charges of negligence made against it. We think otherwise. The wires of that company were stretched on the south side of Jane street, while the wires of the telephone company were strung alone the north side. There were shade trees on this street, and the telephone wires passed through the branches of a sycamore, and also those of an oak tree. The electric light company had stretched two wires across the street to a pole upon which a transformer was located. The wires to the transformer passed through the limbs of the sycamore tree, and the insulation was abraded by the swaying of its branches. The distance between the telephone and the lighting wires at the point of crossing was variously estimated by witnesses to be from eight inches to three feet. There were no guards between the two systems of wires at this point of crossing. The electric light wires were charged with a heavy current of electricity, and the office of

the transformer was to reduce the electrical voltage, so that a lesser current might be transmitted from the transformer by secondary wires to the house of Mr. Mathis, one of the patrons of the electric light company, located near the transformer, and on the same side of the street. There was expert testimony that the construction and maintenance of both of the electric systems were proper; that guards were unnecessary, ineffective, and tended to increase the hazard they were designed to obviate, and, if erected, would probably not have afforded any additional protection. It further appeared that the fallen telephone wire would not have been charged with a dangerous current of electricity by coming into contact with either or both of the electric light wires, had not one of the lighting wires become grounded by a cause for which the electric light company was not responsible. In the early part of the night of May 15, 1902, Waycross was visited by a severe wind and rain storm. There was some dispute as to its degree of severity. Some witnesses asserted that a storm of its severity had theretofore been unknown. Others testified that, while the storm was unquestionably severe, it was not unprecedented in that locality. The effect of the storm was to break one of the telephone wires on Jane street, west of the transformer pole above referred to. The wire was blown over and upon the garden fence of Mr. Mathis, and fell across the sidewalk in front of his house. A pedestrian passed this point before the storm had ceased, became entangled in the wire, but escaped without injury. Within twenty minutes thereafter the plaintiff's husband encountered the same fallen wire, and was killed by the high electrical current with which it was charged. In the meantime a tree on Plant avenue, some distance away, had been blown by the storm across the electric light company's wires, causing them to become grounded at that point. In the opinion of the expert witnesses, the grounding of these wires caused the telephone wire to become charged with an electric current of heavy voltage, and was the efficient and proximate cause of the homicide. As to which was the proper side of Jane street on which to locate the transformer of the electric light company, the evidence was conflicting. It had located its transformer pole on the north side of that street before the telephone company erected its system; the object in carrying the wires across the street being to locate the transformer

as close to Mr. Mathis's house as possible, in order that he might receive better service than could be afforded if the pole was erected on the opposite side of the street. There was proof that secondary wires run from a transformer placed on the south side would not have carried a dangerously high current, and would have afforded ample service to the electric light company's patron on the north side of the street. But it would seem from the evidence upon this branch of the case that nothing short of extraordinary diligence on the part of that company would have suggested that, after the telephone company erected its line, the transformer should be removed to the south side of the street, in order to guard against all possible danger of the wires of the two systems coming into contact, especially as the testimony disclosed that, even were the telephone wires to fall across the lighting wires, the telephone wires would not become charged with a dangerous current of electricity, unless, by reason of some unforeseen emergency, such as afterwards occurred on the night of the homicide, the lighting wires were grounded. Whether or not, in the exercise of ordinary diligence, this precautionary measure should have been taken by the electric light company, was peculiarly a question for the jury to determine. Upon what theory the jury reached the conclusion that the telephone company was chargeable with negligence is, of course, purely a matter of conjecture. As to the electric light company, suffice it to say that we are not prepared to hold that the evidence demanded a finding against it.

Judgment affirmed. All the Justices concur.

GERMAN-AMERICAN INSURANCE COMPANY v. NEW YORK GAS & ELECTRIC LIGHT, HEAT & POWER COMPANY ET AL.

New York Appellate Division, First Department — April 7, 1905.

103 App. Div. 310, 93 N. Y. Supp. 46.

1. FIRE RESULTING FROM NEGLIGENCE OF ELECTRIC LIGHT COMPANY — SUBROGATION OF INSURANCE COMPANY PAYING LOSS OCCASIONED BY SUCH FIRE — EVIDENCE. — Where a fire results in consequence of the negligence of an electric light, heat, and power company in installing electric wires in a building and in thereafter maintaining them, an insurance company, which has been obliged under its policies to pay loss resulting from such fire, becomes subrogated to the rights of its policyholders, and

may maintain an action to recover the loss paid by it from the electric light, heat, and power company. In such an action the electric light, heat, and power company is not entitled to show what would be the rules and regulations of the various city departments, and of the board of fire underwriters with reference to installing electric wires in buildings, and that such rules and regulations had been complied with in the building in question. Unverified certificates, whether made by private individuals or by officials, as to whether or not the work of installing and maintaining the wires was properly done, are inadmissible.

2. SAME — EXPERT TESTIMONY. — Whether or not the proper method has been adopted in installing and maintaining the electric wires in a building is a matter which may be shown by expert testimony. The experts may properly be asked whether a specified manner of installing and maintaining electric wires is good construction.

Appeal by the defendants from a judgment of the Supreme Court in favor of the plaintiff and from an order denying defendants' motion for a new trial. *Affirmed.*

Before VAN BRUNT, P. J., and MCLAUGHLIN, PATTERSON, INGRAHAM, and LAUGHLIN, JJ.

Henry J. Hemmens, for appellants.

Richard J. Donovan, for respondent.

Opinion by MCLAUGHLIN, J.:

On the 25th of February, 1900, a building in the city of New York, together with personal property therein belonging to certain tenants, was destroyed by fire. The plaintiff and other insurance companies, having issued policies to such tenants indemnifying them against loss or damage, and, after the fire, having paid such losses, were subrogated to the rights of the tenants. Thereafter the claims of the other insurance companies were assigned to the plaintiff, which brought this action to recover from the defendants the aggregate amount of the loss, on the ground that the destruction of the property covered by the policies of insurance was caused by their negligence in constructing and thereafter maintaining their electric wires upon the building. The answer denied all of the material allegations tending to show negligence on the part of the defendants. At the trial there was substantially no dispute as to the destruction by fire of the property referred to in the complaint, or that it was of the value as therein alleged. It, however, was seriously contested that such destruction was

caused by the defendants' negligence, and much evidence was offered by both parties bearing on that subject. At the conclusion of the trial the case was submitted to the jury with appropriate instructions as to the rights of the respective parties. The jury returned a verdict in favor of the plaintiff for the amount claimed, and from the judgment entered thereon and an order denying a motion for a new trial, defendants have appealed.

I am of the opinion that the learned trial justice did not err in submitting the question of defendants' liability to the jury, and that the evidence is sufficient to sustain their verdict. From this evidence it appeared that in 1896 the North River Electric Light & Power Company (since succeeded by the defendant the New York Edison Company), for the purpose of furnishing lights to the tenants, installed a system of electric wires upon the building, and has since maintained the same. This system consisted of two primary wires, carrying a current of 1,000 volts, which ran from a pole in front of the building into a transformer fastened thereon, where the current was reduced to a lower voltage, and then distributed throughout the building by means of secondary wires. These secondary wires carried about fifty volts, and extended from the transformer to porcelain insulators below it, and from there they extended over the outer edge of a metal cornice into the building. The wires, at the time they were erected, were covered with rubber, and entirely insulated, and were separated from the building by the two porcelain insulators referred to. The plaintiff contended, and evidence was offered sustaining such conten-

tory, on this branch of the case. Plaintiff's witness Lynch, a police officer of the city, testified that while patrolling his post a little after 1 o'clock in the morning of the day when the fire occurred he saw a blue flame coming from the wires which extended over the cornice, and rapped for assistance, to which another police officer (Gordon) responded; that he also notified a fireman in that vicinity of the fact; that the fireman (one Perry) responded to his call, and when he arrived at the scene the flame continued to come from the wire, and thereafter the wood underneath the cornice became ignited, spreading into the other parts of the building; that on top of the metal cornice, and immediately underneath the transformer, there was a hole fused through the metal, and it was here the wood first caught fire. This witness was corroborated by Officer Gordon, who testified: "I saw this wire burning. The wire was on the cornice over the doorway of this house. The transformer was right above where the sparks were. I could see the fire burning into the cornice, and I could see the wire on the cornice." He was also corroborated by the fireman, who testified that he went to the building in response to Lynch's summons, and when he got there he went up on a ladder, and found a hole in the metal cornice directly under the transformer. To use his own language, he said: "At that time I saw fire only in the cornice. There was no fire in any other place in the building as I know of. * * * There was a little fire around the hole in the tin. It was burning inside. This was underneath the big hole." He was also corroborated by another witness, who testified he was getting off a street car in that locality, and saw "sparks coming from above the doorway of the building there, and a sizzling noise and blue flames. * * * There was some fire on the cornice. The fire burned there, before it broke out in other places, possibly an hour. * * * The sparks varied. It was raining and snowing, and every time the snow would fall, possibly it struck that wire, and it sizzled, and a blue flame came out." Much testimony was offered on the part of the defendants that the fire could not have been caused in this way. Notwithstanding that fact, taking the testimony upon both sides, the court could not do otherwise than submit the same to the jury.

It is contended that, if it be conceded that the fire was caused by the wires, this, in and of itself, did not justify a recovery.

Assuming, without assenting that such contention is correct, this naturally leads to the inquiry as to whether the defendants were negligent in constructing or thereafter maintaining the wires. At least five witnesses on the part of the plaintiff, who were familiar with the location of the wires and the transformer, either from occupying offices in the building or from having made an examination of them at the time of the fire, testified that the transformer was only six or seven inches above the cornice; that the insulators were below the transformer, and so placed that there was at most but a few inches between them and the top of the cornice, even if the wires did not sag; that the wires did sag, and were lying upon the cornice. This was the testimony of the witness Lynch, already referred to, who was corroborated by the witness Long, who had an office in the building. He testified that he could see the wires every day when he looked out of his window; that there were no porcelain knobs or any insulating materials of any kind between the building and the outer edge of the cornice; that he saw the wires several days before the fire lying on the metal, and there was no insulation on them. Substantially to the same effect was the testimony of the witness Horgan, an occupant of the building, who testified that previous to the fire he observed the secondary wires lying on the metal, and the witness Knox also testified that there were no porcelain knobs to prevent the wires from "sagging down." The witness Osterberger, an electrical expert, testified that wires constructed in the manner stated were improperly constructed. There was also other testimony similar to that

This, and similar questions, were duly objected to, the objections overruled, exceptions taken, and the witness answered that it was poor insulation. The facts assumed in the hypothetical question had been established by the testimony of other witnesses, and it seems to me it was a proper subject for expert evidence, and therefore the court did not err in permitting the witness to answer. Whether or not a proper method has been adopted in installing and maintaining electric wires upon a building is a subject concerning which but few persons other than experts have any knowledge. In fact, the whole subject of electricity is one concerning which at the present time but little is known, and it is not a violent assumption to assume there was not a man on the jury who could intelligently determine, without the benefit of the testimony of an expert, whether there ought to have been different insulation than that adopted by the defendants. It was peculiarly a subject for expert testimony. In *Hart v. Hudson River Bridge Co.,* 84 N. Y. 56, a witness was permitted to testify that it was not customary to have guards of any kind on drawbridges, and in *Ward v. Kilpatrick,* 85 N. Y. 414, 39 Am. Rep. 674, the court held that it was competent for a cabinetmaker to testify whether certain work were well done. In *Finn v. Cassidy,* 165 N. Y. 584, 59 N. E. 311, 53 L. R. A. 877, the court held it was proper for a witness to give his opinion as to whether a proper method had been adopted in constructing a trench for the purpose of undermining or supporting the foundation of a chimney. In *Chicago v. Greer,* 76 U. S. 726, 19 L. Ed. 769, an expert was permitted to state that a test applied to a fire hose was not a proper one; and in *Transportation Line v. Hope,* 95 U. S. 297, 24 L. Ed. 477, it was held that it was proper for an expert to give his opinion as to whether it would be prudent for a tugboat to tow three boats abreast, in a high wind, at a certain place.

The defendants sought to show what were the rules and regulations of the various city departments and of the board of fire underwriters with reference to placing electric wires upon buildings, and that these rules and regulations had been complied with so far as the building in question was concerned. Such testimony was excluded on plaintiff's objection, and error is claimed in this respect. . I do not think any error was committed in rejecting the testimony. The issue between the parties was whether or

not defendants had been guilty of negligence in installing or thereafter maintaining the wires. This issue had to be determined upon evidence showing, in the first instance, how the work was done, and what had thereafter taken place with reference thereto, and the plaintiff was entitled to have the person whose evidence was sought produced, to the end that he might be cross-examined. The unsworn statement as to whether this work was properly done was inadmissible, and it made no difference whether the person making the statement was a private individual or an official. The certificates, etc., offered were unverified, and had no more binding force upon the issue being tried than they would if they had been simply a written declaration by a third party. *Dechert v. Municipal Electric Light Co.*, 39 App. Div. 490, 57 N. Y. Supp. 225.

Other questions are raised by the appellants, but they do not seem to be of sufficient importance to be here considered.

The judgment and order appealed from, therefore, must be affirmed, with costs. All concur, except INGRAHAM, J., who dissents.

SOUTH COVINGTON & CINCINNATI STREET RAILWAY CO. *v.* SMITH.

Kentucky Court of Appeals — May 2, 1905.

3 St. Ry. Rep. 264, 27 Ky. L. Rep. 811, 86 S. W. 970.

1. PASSENGER INJURED BY SHOCK FROM DEFECTIVE CONTROLLER BOX. — Where a passenger standing on platform of a street car was thrown against a

Appeal by defendant from judgment for plaintiff. *Affirmed.*

L. J. Crawford, for appellant.

Phil J. Ryan and *Thos. L. Michie,* for appellee.

Opinion by HOBSON, C. J.:

Appellee recovered a verdict for $4,000 against appellant for personal injuries received by him while a passenger on one of its cars. The proof is very conflicting. The proof on his behalf is to the effect that he, with two companions, got on the street car to come home; that they stood on the rear platform of the car, and the conductor there took up their fares. Soon after this, when the car was turning a corner, the lurch of the car caused appellee to throw out his hand, and when it came in contact with the controller box he received a shock of electricity which caused him to fall to the floor. He was unconscious until the next morning. His arm was paralyzed. His hand was clenched so that he could not open it, and, as one of the witnesses expressed it, the arm was dead. It was some weeks before this condition passed away. At the end of that time the muscles were relaxed so that he had no strength in the arm. For a while he improved, but at the trial he had about one-fifth of the strength in the arm that he had before, and the doctor who had attended him was unable to say whether the injury would be permanent or not. This was some months after he was hurt. He suffered a great deal from the injury. For a while he could not work at all, and his capacity to earn money was reduced from nine dollars to seven dollars a week at the time of the trial. He still suffered very much at times, and was very nervous. The proof for the plaintiff also tended to show that the car was in bad condition, and that this was known to the defendant, and unknown to him; that regularly there should have been no electricity about the controller box; that it was a rainy day; and when the car floor was wet, and a man's shoes were wet, there would be more danger from a shock than under other conditions. On the other hand, the proof for the defendant showed that the car was in good condition, and had not been out of order; that there was no electricity about the controller box, and that the plaintiff simply fell down from a fit or some other sudden malady; that he had a weak heart, and that he was otherwise in a normal condition at the time of the trial. The evidence

was such that the court properly left the case to the jury, and under all the facts and circumstances we cannot say that their verdict is flagrantly against the evidence, or that the amount of the recovery is so large as to justify us in disturbing it on the ground of passion or prejudice.

The chief complaint is that the court erred in his instructions to the jury. By instruction "a" given on the motion of the plaintiff, the court told the jury, among other things, that they should find for the plaintiff if "the defendant failed to use the utmost care to prevent such electric current from being in said controller box;" but by instruction 3 given on the motion of the defendant the court also instructed the jury that if they believed from the evidence "that the defendant used the utmost care and skill ordinarily used by persons in the same or similar business of carrying passengers" to prevent and guard against such injuries as plaintiff complained of receiving, they should find for the defendant. The two instructions must be read together, and, when so read, fairly present the law of the case. At least appellant cannot complain, as the third instruction was given on its own motion. Appellant also complains that the court by its instructions allowed the jury to find for the plaintiff, among other things, his expenses for medical attention, without limiting them to $200, the amount alleged by the plaintiff in his petition to have been expended for medical attention. Appellant could not have been prejudiced by this, as the proof showed that the doctor's bill was $200, and there was no other evidence on the subject.

touching the controller box, inflicting on him the injury complained of, they might properly find for the plaintiff, and whether the controller box was in fact charged with electricity and the plaintiff was in fact injured by coming in contact with it were questions that were fairly submitted to the jury by the instructions of the court. The question of contributory negligence on the part of the plaintiff was also for the jury under the proof, and was fairly submitted to the jury by the instructions.

Judgment affirmed.

SMITH v. MISSOURI & K. TELEPHONE CO.

Missouri — Kansas City Court of Appeals — May 8, 1905.

113 Mo. App. 429, 87 S. W. 71.

1. INJURY TO TELEPHONE LINEMAN FROM ELECTRIC SHOCK — DEFECTIVE CONSTRUCTION OF GUY POLE — EFFECT OF STORMS ON LIABILITY FOR NEGLIGENT CONSTRUCTION. — In an action against a telephone company for injuries to a lineman from contact with a live wire, alleged to have been caused by the negligence of the defendant in constructing a guy pole, it was held that it was the duty of the defendant in erecting the pole to take into consideration the probable results of a storm, and that it was not enough to exonerate the defendant to show that the guy pole was a safe construction in fair weather.
2. SAME — PROXIMATE CAUSE. — The negligent construction of the guy pole caused the primary wires of an electric company to part. The ends of these heavily charged wires threatened injury to persons in the street. Under such circumstances, the negligent act which first caused the wires to become dangerous was the proximate cause of the injury, and not the act of some person in wrapping the loose ends of the broken wires around the pole before the plaintiff was injured.
3. SAME — FAILURE TO USE RUBBER GLOVES AND TO TEST WIRES — CONTRIBUTORY NEGLIGENCE. — Failure of a telephone lineman to use rubber gloves and to make a test to ascertain if certain wires were charged, *held*, under the circumstances, not to constitute contributory negligence.
4. SAME — EVIDENCE. — Evidence relating to the condition of the wires shortly after the accident was admissible. It was also proper to show the condition of the guy pole two months after the accident, for the purpose of proving an unchanged condition which existed at the time of the injury.

Appeal by defendant from a judgment for plaintiff. *Affirmed.*

Mosman & Ryan, for appellant.

W. K. Amick, for respondent.

Opinion by JOHNSON, J.:

Action for damages for personal injuries consequent to a fall from the top of a telephone pole where plaintiff, a lineman, was engaged in making certain repairs. Negligence on the part of defendant, it is charged, was the producing cause of the fall. Plaintiff recovered judgment in the sum of $3,000. No complaint is made of an excessive verdict, but defendant asks a reversal because of errors claimed to have been committed during the progress of the trial, first among which was the overruling of its demurrer to the evidence.

The injury occurred September 8, 1903, in the city of St. Joseph. At that time the city was operating its own system of public lighting, generating and using electricity for that purpose. The business of producing and supplying electricity for private use, either as power or for lighting, was conducted by the street railway company. Defendant was operating a telephone exchange. All three corporations used the public streets for their lines of wire, strung upon poles, which carried the power to the various points of use throughout the city. The currents of electricity carried through the streets by the city and railway company being highly potential, the wires through which they flowed were insulated, and in many instances strung upon the same line of poles. Defendant, employing none but currents of low power, used in their transmission bare wires carried upon its own pole lines. The pole from which plaintiff fell was situated on the east side of St. Joseph avenue, at its intersection with Park street. It belonged to the city, but was in a line jointly used by the city and the railway company for the carriage of wires. This line came from the south from where the power was generated, and passed along the east side of St. Joseph avenue to and beyond Broadway street. The wires carried by it with which we are concerned consisted of two used by the railway company in the transmission of currents of electricity for private use, termed in the evidence "primary wires," and one used by the city in feeding its arc lamps, called the "city wire." As the negligent act complained of is said to have occurred upon this line at or near Broadway street some six blocks north of the place of injury, it is important, in reviewing the action of the court in overruling the demurrer, to understand the details of the situation at that

point; and we will select as the focus of observation a certain pole, a unit in this line, located at a point where the highway slightly deflects in its course. This pole is called in the evidence the "railway pole," and, before the accident, carried on the eastern projection of two cross-arms the two primary wires and the city wire referred to. On the opposite side of the avenue was situated an important lead in defendant's telephone system, which consisted of a heavy pole line provided with cross-arms and pins sufficient to support and carry fifty wires. Coming from the south to the railway pole, the direction of the avenue was east of north. Shortly before reaching the pole it curved somewhat sharply to the left, until, pointed due north, it proceeded in that direction upon a tangent. The telephone lines, following the course of the street, curved to the left at the point opposite the railway pole.

In order to strengthen the resistance of the telephone pole located in the curve to the strain imposed upon it by the weight and tension of taut wires, defendant set a guy pole about one foot north of the railway pole, and from the top thereof ran a tightly drawn wire across the street to the telephone pole, securely fastened to the tops of both poles, and of sufficient strength to hold the telephone pole in place, provided the guy pole retained its position. This was attempted to be secured by running a tightly drawn wire attached to the top of the guy pole and to an anchor planted in the ground some twenty-five feet east of the pole, the idea being that with such construction the telephone pole could not incline westward without drawing with it the top of the guy pole, which could not be moved in that direction without the extraction of the buried anchor from its position. The first pole in line south of the railway pole was about twenty-five feet distant therefrom, and carried on its top a lamp fed by the city wire. There was but one cross-arm attached to this pole, but the "city wire" was looped into the lamp above from the opposite ends of a smaller cross-arm attached to the other at a right angle thereto, thus preserving, in the passage of the wire in and out of the lamp, the line of its course. The position of this wire on the cross-arms was immediately east of the railway and city poles; to the east thereof, at intervals of about ten inches, were the two primary wires. Up to this point there is no dispute over the facts. The differences all relate to those we are about to detail, and with

respect to them we shall adopt plaintiff's version in the consideration of the demurrer.

The guy pole had been in position for something less than two months. It is claimed that while at its base it was in line with the other poles, it was raked to the east when set so that its top was approximately three feet east of its base and cleared the outside primary wire; but owing to the negligent manner in which it was set, the top had been pulled west and north until the west perpendicular line of the pole was on a line with the pins carrying the intermediate primary wire, with the result that some time shortly preceding the accident the outside primary wire, owing to the great pressure exerted upon it by the guy pole, tore out its fastenings from the cross-arms on the railway and city poles, and was thrown across the city wire upon its individual cross-arm on the city pole, and also across the other primary wire at a point some five feet south of the railway pole. This latter contact resulted in the generation of sufficient heat to melt both primary wires. Their parted ends dropped to the ground, after which the contact between the primary wire and the city wire at the city pole continued. It appears from some of the evidence that the insulation was old and defective on all of these wires. The negligence in the setting of the guy pole appears from the following facts:

The length of the pole was some thirty-five feet. It was set in the ground about five and a half feet. The anchor, a piece of pole five or six feet long, was buried to a depth of about five feet.

guy pole inclined northward about three feet. It no longer raked to the east, but stood in a perpendicular line east and west. As an indication that the pole had yielded to the strain upon it, the ground to the west of its base was found pushed upward and outward, while to the east there was a space between the pole and earth into which a man's hand could be inserted readily.

The night preceding the accident a storm of some severity occurred, which blew down some few telephone poles in different parts of the city, and caused other damage requiring repair work to be done the next day. The wires on the city pole at Park street were affected, and plaintiff — employed by the city — was sent up the pole to make necessary repairs. In taking position to work, he rested one foot on an iron step, and threw the other over the cross-arm. Finding one of the "primary" wires interfering with his position, he seized it with his hand in order to remove it out of the way. At that instant his foot slipped slightly on the step, causing his body to swerve into contact with the city wire, thereby forming a connection between the two wires through the medium of his arm and body. A shock followed, of sufficient intensity to burn his hand and shoulder at the points of contact and to deprive him of consciousness. He fell from the pole, a distance of some twenty-five feet. The city lamps on this line were upon what is called a "metallic circuit;" that is, the electric fluid which fed them traveled its entire course upon wires without coming into contact with the earth. In fact, a "grounding" of the circuit at any point would change the course of the current from the wire running through the lamps to the earth, for the latter medium offered less resistance than the lamps — and an electric current travels the line of least resistance. It therefore was essential to the operation of the lamps to keep the circuit free from terrestrial communication. The "primary" wires were upon what is called a "ground circuit;" that is, the current was carried to the end of the line upon a wire, and there connected with the earth, through which it returned to the place of generation; but in case the wire at any intermediate point was brought into connection with the ground by any good conductor of electricity, the current would use the shorter line of travel thus established. And also it appears to be a law of some importance in this case that when wires of two parallel circuits carrying different currents, the one

high and the other low in potentiality, are brought into contact, the high current will overflow into the low in an effort to equalize the two. It will thus be seen, keeping in view these principles, that, notwithstanding plaintiff received his shock between the city pole at Broadway and the power houses, if the wires, or any of them which formed a part of the three different circuits became grounded, and the city wire formed a contact with either of the primary wires, the plaintiff, in acting as a conductor between the city wire and one of the primary wires, would receive a severe shock, as the primary wires carried currents of 1,000 and 500 volts respectively. The city wire at the time of injury carried no current, the lamps being used only at night.

Thus it appears a complete chain of facts connects defendant's negligence in the setting of the guy pole with the injury to the plaintiff. We do not understand it to be denied by defendant that such causal connection has been shown by plaintiff's evidence. It is at least tacitly admitted that plaintiff's shock could have been produced as the result of the breaking of the primary wires at Broadway, and their intermingling with the city wire as above described. But defendant says that other causes for which it would not be liable could have produced the shock, independent of the negligent act charged, and that the jury necessarily was compelled to speculate in the selection of defendant's negligence as the proximate cause. It is pointed out that the storm of the previous night was of great violence, that much damage to poles and wires resulted therefrom, and that the break at the railway pole could have resulted from elemental action. It is not shown that any pole or tree or other object was thrown against the line at any point near the railway pole, nor does any other fact appear which indicates that the storm alone was responsible for the damage. It seems highly probable that the wires were torn loose during that disturbance, but nothing else can be pointed to as the cause of the charging of the city wire with currents drawn from the others but the strain imposed upon the primary wire by the guy pole. It was the duty of the defendant, in erecting that pole, to take into consideration the probable results of the usual elemental action. It is not enough to exonerate it from blame to show that the guy pole, as it stood, was a safe construction in fair weather. Severe storms are a normal condition, and any construction is not

reasonably safe, and cannot be denominated the result of proper care, that will not withstand them. Defendant's evidence does not show that the storm was of overpowering violence, such as could not be guarded against by ordinary foresight; while plaintiff's evidence is to the effect that it was not of unusual severity. Under all the facts shown, it is reasonable to infer that the impact of the wind coming from a westerly direction against the heavily loaded telephone line bent it eastward, thereby slackening the strain upon the guy pole wire. The resilient reaction of the telephone line following the cessation of the wind tightened the guy wire with violent force, which, being communicated to the loosened guy pole, jerked it forward upon the primary wire with force sufficient to tear it from its moorings. The storm cannot be considered, under the evidence, as a sole producing cause of the damage, but rather as a condition which accelerated the natural result to be expected from the negligent construction. Also, it is urged that the negligence of some unknown person may have caused the cross between the primary and city wires, existing at the time of injury. It appears that some one had wrapped the loose ends of the broken primary wires around the city pole, probably before plaintiff received his shock. Evidently, this was done to prevent injury to people upon the street. But it is not shown, nor does it appear in any manner, that this act affected the position of the wires upon the cross-arm above.

We do not feel justified in resorting to conjecture, as would have to be done should we infer that the contact of the wires above mentioned resulted from that act. But assuming, for argument, that the wires were negligently wrapped around the pole, and thereby brought together on the cross-arm, we cannot adopt defendant's conclusion that such act would lift the burden of responsibility for plaintiff's injury from defendant. The danger was produced by the parting of the primary wires, the direct result of defendant's negligence. The loosened ends of these heavily loaded wires, darting here and there upon the ground in a public highway, threatened any one who happened to be there with serious injury, even with death. It was a work of imperative necessity to confine the danger as far as possible. Under such circumstances, the negligent act which first turned loose the death-dealing power must be held to be the proximate cause of any in-

jury resulting therefrom; not the acts of those who, in attempting to limit its sphere of operation, diverted its course, thereby aiding in the infliction of damage in an unanticipated quarter.

Other producing causes presented for consideration — one, that the cross-arms on the railway and city poles gave way because of their unsound condition, and another, that the pole from which plaintiff fell had been saturated with water from rainfall to the extent that it became a good conductor of electricity, and, as such, together with plaintiff's body, formed the connecting medium between the primary wire and the ground — may be dismissed with the observation that they are predicated entirely upon defendant's evidence, and are contradictory to the facts brought out by plaintiff. These issues, therefore, were settled by the verdict of the jury, so far as we are concerned.

Finally, it is urged the demurrer should have been given on the ground that plaintiff was guilty of contributory negligence under the facts disclosed by his evidence. We think, under the facts, this issue was for the jury to decide. It is claimed plaintiff should have worn rubber gloves in handling high power wires; also should have made a test to ascertain if the city wire was charged, and should not have relied upon the supposition that no current was upon it, But it is shown, in answer to this, that there is no danger in handling live wires when the body is not in position to connect them with other charged wires or with the ground, and that a telephone pole being a poor conductor, will not aid in grounding a current. Also, it appeared that, while plaintiff believed the city wire was "dead," he acted upon the contrary assumption, and did not voluntarily come into contact with it. The closing of the circuit by his body was purely accidental, being caused by the slipping of his foot. His failure to test the city wire was immaterial under the facts stated by him, which, in the consideration of the question before us, we must accept, and which sustain his assertion that he treated the city wire as one charged with a current. Under the views expressed, we must hold no error was committed in overruling the demurrer.

Objections also are made to the rulings upon the admission of evidence. Plaintiff was permitted to testify relative to observations of the guy pole made by him two months after the accident, particularly with reference to the condition of the ground at its

base. Another witness, also, was permitted to testify to the condition existing there two weeks after the accident. Both witnesses testified to the same condition; that is, that on the west the ground was pushed up, and on the east there was a space between the earth and pole. The materiality of the evidence is made manifest by the sharp conflict between the parties relative to the manner of setting the pole. Plaintiff's witnesses contended that it was raked eastward a sufficient distance to clear both primary wires, and altered its position as before detailed, while defendant claimed that the pole was set upright between the two primary wires, and that its position never changed. It will be observed that all agree upon the position of the pole at the time of injury. Assuming defendant's claim of no change in position, the ground at the base of the pole would have remained undisturbed; while, if plaintiff was right in saying the top had shifted to the west, the earth at the base would show the conditions described by him and his other witness. The fact the evidence of both parties shows that the position of the top of the pole was the same two months after the accident that it was two weeks thereafter, and at the time thereof, furnishes the connecting proof that the condition of the ground at its base was the same at all three periods, and left it a matter for the jury to say which of the two conditions described existed. The rule followed in the cases of *Hipsley v. Ry. Co.*, 88 Mo. 348, *Alcorn v. Ry. Co.*, 108 Mo. 81, 18 S. W. 188, and *Ely v. Ry. Co.*, 77 Mo. 34, cited by defendant, does not apply. It goes no further than to prevent proof of a subsequent change of construction being received as bearing upon the fact of negligence. Here the evidence was offered for the purpose of proving an unchanged condition which existed at the time of injury. It is not to be inferred we are holding that such evidence may be received without connecting proof, but we are deciding that such proof was shown.

The evidence relating to the condition of the wires shortly after the accident also was admissible. Under the views herein expressed, the fact of the wrapping of the primary wires around the city pole did not deprive such evidence of probative force. Without further comment on this branch of the case, we say there was no substantial error in the action of the court in passing upon questions of evidence.

We find the issues bearing upon the fact of negligence were

fairly submitted in the instructions, and that no variance exists between the negligent act alleged and that proven and submitted. Our comment upon the instructions will be confined to the following, given on behalf of plaintiff:

"An expert witness is one who is skilled in any particular art, trade, or profession, being possessed of peculiar knowledge concerning the same, acquired by study, observation, and practice. Expert testimony is the opinion of such a witness, based upon the facts in the case as shown by the evidence, *but it does not even tend to prove any fact upon which it is based, and, before you can give any weight whatever to expert testimony, you must first find from the evidence that the facts upon which it is based are true.* The jury is not bound by expert testimony, but it should be considered by you in connection with the other evidence in the case."

The italicized words are objected to as containing an improper definition and prejudicial direction, the harmfulness of which, it is urged, is emphasized by the fact that some of defendant's witnesses from whom opinion evidence was elicited also gave testimony upon basic facts. Generally speaking, the opinion of a witness who, by reason of his training and experience in a given art, profession, or trade, possesses superior knowledge to that enjoyed by others, is received for the purpose of aiding the triers of fact in reaching a conclusion upon an ultimate fact not susceptible of direct proof, but deducible from proven facts. For the purpose of obtaining such opinion, the questioner is permitted to assume as proven the basic facts he is attempting to establish, and which are usually vital issues in the case. The opinion, therefore, is a dependent, a sort of superstructure imposed upon an hypothetical foundation, and stands or falls with its supporting facts. Obviously, a conclusion cannot serve to strengthen the premises from which it arises. Therefore the statement that such evidence " does not even tend to prove any fact upon which it is based " is correct in principle.

It is the duty of the court, when called upon, to define the nature of expert evidence in the instruction given the jury, and error cannot be held to result from a correct definition. The meaning of the language employed in the instruction before us is clear and free from ambiguity, and we must presume the jury understood it in its proper sense. If they did, no room appears for the supposition that the credibility of witnesses who testified both to facts and opinion may have been affected improperly by the rules peculiar to opinion evidence, nor that the jury failed to

give due weight to the entire testimony of such witnesses. The principle embodied in the final sentence of the instruction has been approved in a number of cases, and may be considered a settled rule. As opinion evidence is but advisory, the jury is not bound by it. *Hull v. Trustee,* 138 Mo. 618, 40 S. W. 89, 42 L. R. A. 753; *Cosgrove v. Leonard,* 134 Mo. 425, 33 S. W. 777, 35 S. W. 1137; *City of Kansas v. Street,* 36 Mo. App. 666; *W. U. Tel. Co. v. Guernsey,* 3 Am. Electl. Cas. 425, 46 Mo. App. 120.

The judgment is affirmed. All concur.

LINTON v. WEYMOUTH LIGHT & POWER CO.

Massachusetts Supreme Judicial Court — May 20, 1905.

188 Mass. 276, 74 N. E. 321.

1. INJURY FROM ELECTRIC LIGHT WIRE — DEFECTIVE INSULATION — NEGLIGENCE — QUESTION FOR JURY. — In an action to recover from an electric company for injuries sustained from contact with a live wire, it appeared that the wire was for supplying power to light a house and carried an alternating current of 3,500 volts, that the wire ran through branches of trees, that the insulation was worn off, and that there was a better method of insulation than that used. *Held,* that the question of the electric company's negligence was for the jury.
2. SAME — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. — Where, in an action to recover for injuries received by contact with a live wire, it appeared that the plaintiff had boasted of his knowledge of electricity and had acted carelessly around the wires, and that the evidence was conflicting, *held,* that the question of his contributory negligence was for the jury.

Exceptions by plaintiff from judgment for defendant. *Exceptions sustained.*

Geo. R. Swasey and *Albert P. Worthen,* for plaintiff.

John and *Jas. A. Lowell,* for defendant.

Opinion by LATHROP, J.:

We are of opinion in this case that there was evidence sufficient to submit to the jury, both on the question of negligence on the part of the defendant and of due care on the part of the plaintiff. The wire with which the plaintiff came in contact was one for supplying power for house lighting, and carried an alternating cur-

rent of 3,500 volts, while a current as high as 1,000 volts was dangerous to life, as the superintendent of the defendant company testified. At the place of the accident the wire, though supported on poles, ran through branches of trees, and this, the superintendent testified, was a very unsatisfactory way; that the limbs are apt to come in contact with the wires and rub off the insulation; that the insulation of this wire was of rubber cloth covering; and that it would not take a very long time to rub off this covering. There was also evidence that there was a better method of insulation when wires went through trees, and the question whether better insulation should have been used was for the jury. There was evidence that a wire, which the jury might have found to be the same wire, had broken 325 feet from the place of the accident, and that the superintendent had been notified by telephone of this break ten minutes before the accident, and had promised to send a man to attend to it. The superintendent denied receiving this communication, but whether he did receive it or not was a question for the jury; and it was also a question for them whether, if he did receive it, he ought at once to have shut off the power. There was evidence that at the place of the accident the wire hung down over the gutter in a loop within five or six feet of the ground. In *Thomas v. Western Union Telegraph Co.*, 100 Mass. 156, it was said by Mr. Justice HOAR:

"The fact that a telegraph wire is found swinging across a public way at such a height as to obstruct and endanger ordinary travel is in itself, unexplained and unaccounted for, some evidence of neglect on the part of the company whose duty it is to keep it in a proper and safe position, and should have been submitted to the jury."

There are other grounds upon which the plaintiff contends that the case should have been submitted to the jury on the question of the defendant's negligence, but we have stated enough to show that this question was for the jury.

The question whether the plaintiff was in the exercise of due care is more doubtful; but on the whole we are of opinion that this also was, under all the circumstances of the case, a question for the jury. About an hour before the accident the plaintiff saw the broken wire emitting sparks from time to time, and he remained there watching it. He made various boasts about his knowledge of electricity, and poked the wire from the gutter onto the sidewalk with his umbrella; and when requested by a deputy

sheriff to move it back into the gutter he did so. After about half or three-quarters of an hour he started for his destination on the same side of the street. He had seen another person leave about two minutes before he did, going in the same direction. Then something happened to him; he did not know what. He testified that he did not leave the sidewalk, and paid no attention to the wires. The witness who left two minutes before he did testified that he saw a loop of the same wire that had emitted sparks hanging down between two poles, about half way to the ground. The plaintiff was found in an unconscious condition on the sidewalk, with his hands grasping the wire. He was severely burned before he could be rescued. The theory of the plaintiff is that the loop was blown by the wind, which there was evidence was at that time eleven miles an hour, across the sidewalk, and that he came in contact with it. The theory of the defendant was that the plaintiff was walking near the edge of the gutter, and meddled with the wire while it hung over the gutter, and that the wind was not strong enough to blow the loop over the sidewalk. Which theory was correct was for the jury upon all the evidence in the case. See *Bourget v. Cambridge,* 156 Mass. 391, 31 N. E. 390, 16 L. R. A. 605; s. c., 159 Mass. 388, 34 N. E. 455.

Exceptions sustained.

BROWN v. ASHEVILLE ELECTRIC LIGHT CO. ET AL.

North Carolina Supreme Court — May 26, 1905.

138 N. Car. 533, 51 S. E. 62.

EMINENT DOMAIN — USE OF STREETS BY ELECTRIC COMPANIES — RIGHTS OF ABUTTING OWNERS — CUTTING SHADE TREES. — Where a city has acquired highways by condemnation, no additional burden can be placed upon abutting owners without compensation. Thus, the city cannot authorize an electric company to cut trees on the edge of a sidewalk for mere convenience in erecting wires and poles.

Appeal by defendants from a judgment for plaintiff. *Affirmed.*

J. C. Martin and *F. A. Sondley,* for appellants.

Frank Carter and *H. C. Chedester,* for appellee.

Opinion by CONNOR, J.:

For the purpose of disposing of the questions presented upon this record, we may take certain propositions as settled: The land over which are the street and sidewalk upon which plaintiff resides was the property of the grantor of the plaintiff. By condemnation proceedings duly had, the city of Asheville acquired an easement over said land for the purpose of enabling it to open and maintain a public street and sidewalk for the use of the citizens of Asheville. That the fee to said land remained in the owner, and was granted to plaintiff, together with the lot, to the outer edge of the sidewalk. The tree cut down by the defendants stood upon the sidewalk, on the outer edge, and was not a nuisance to or interference with the public use of the sidewalk. That the city, by its charter and amendments thereto, had control of the street and sidewalk, with all of the powers in regard to the use thereof and of removing obstructions therefrom necessary and convenient to that end. That such powers included the right to cut down and remove this or any other tree on the street or sidewalk which, in the judgment of the city authorities, was a nuisance to or an obstruction of the public in the use of the street and sidewalk. That said tree afforded shade to the premises and residence of plaintiff, and its removal depreciated the value of plaintiff's property to the extent of $499, as found by the jury. In view of his honor's instruction to the jury, we must assume that the jury found, and we find ample reason to justify such finding, that the defendant electric light company, with the permission

of the defendants, unless the condemnation was for the purpose of the city, and they would not have the right to go there and cut down the tree unless they were going to use it for the purpose for which it was condemned."

Before discussing the exceptions which challenge the correctness of this and other instructions involving the same principle, it is proper to say that, by an amendment to the charter of the city made subsequent to the condemnation of the land for a street and sidewalk, the city authorities were given power to permit the erection of telegraph, electric light, poles and wires, etc., on and over the public streets of said city. This power, of course, in no manner affects the rights of abutting owners. The legislature could not have intended, because it had no authority, to confer such power, to be exercised in violation of such private rights. It simply empowered the aldermen to grant the franchise over the streets of the city, subject, of course, to the rights of the citizen in respect to his private property. The legislature had no power itself to empower corporations to appropriate private property without compensation, and, of course, could not authorize the city to do so. *C. & P. Tel. Co. v. Mackenzie,* 74 Md. 36, 21 Atl. 690, 28 Am. St. Rep. 219.

There are a large number of exceptions to his honor's charge, both in respect to instructions given and refused. We do not deem it necessary to pass upon all of them, because, in our view of the case, assuming the facts to be as contended by defendants, we find no error in the record. Conceding to the city of Asheville the largest possible powers in respect to opening and controlling its public streets, they must all be construed and exercised within the well-defined limitation that they are held and to be used as a public trust for the benefit of the citizens of Asheville, and not for the convenience or even the necessities of private persons or corporations. In speaking of the exercise of this power, the New York court says:

"But we think it cannot, under guise of exercising this power, appropriate a part of the street to the exclusive, or practically to the exclusive, use of a railroad company, so as to cut off abutting owners from the use of any part of the street without making compensation for the injury sustained." *Reining v. N. Y., L. & W. R. Co.,* 128 N. Y. 168, 28 N. E. 640, 14 L. R. A. 133.

As the question is one of much practical importance to the people of the State, we will endeavor to mark the line which limits the power of municipal and *quasi*-public corporations, or

private corporations engaged in public service, in interfering with the rights of abutting owners upon streets and highways. This court has in *Tate v. Greensboro,* 114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671, defined the power which the duly constituted city authorities have in opening, widening, using, and controlling public streets. That this power, when exercised for the purpose and objects for which it is granted, and in good faith, is not subject to the supervision of the courts, is well decided in that case. We have no disposition to bring that decision, or anything said therein, into question. We adopt what is said by Mr. Justice BURWELL as stating the principle upon which our decision is based:

> "It is not to be denied that the abutting proprietor has rights as an individual in the street in his front, as contradistinguished from his rights therein as a member of the corporation or one of the public. The trees standing in the street along the sidewalk are, in a restricted sense, his trees. If they are cut or injured by an individual who has no authority from the city to cut or remove them, he may recover damages of such individual. His property in them is such that the law will protect it from the act of such wrongdoer and trespasser."

Where it is said "who has no authority from the city," it is meant no lawful authority, because, as we shall see, the city has no power to confer authority except in the manner and for the purpose for which it may do the act itself. Many of the decisions discussing the right of abutting owners upon streets and highways make a distinction between owners holding the fee in the land, and those who have only such rights as accrue from their location on the side of the street. It is conceded that the fee to

quired by condemnation is confined to the public necessity, and to the uses for which property is taken or burdened with the easement; that, for any additional burden placed upon the servient tenement, compensation must be made. *Story v. N. Y. El. R. R.*, 90 N. Y. 122, 43 Am. Rep. 146; *White v. R. Co.*, 113 N. C. 610, 18 S. E. 330, 22 L. R. A. 627, 37 Am. St. Rep. 639; *Phillips v. Telegraph Co.*, 8 Am. Electl. Cas. 287, 130 N. C. 513, 41 S. E. 1022; *Hodges v. Tel. Co.*, 133 N. C. 225, 45 S. E. 572. Such conflict as may be found in the decisions arises out of the application of the principle. It is uniformly held that an easement acquired for one purpose, either by grant, dedication, or condemnation, cannot be appropriated to another purpose. "It is certainly well settled that, where a grant is made or trust created for a specific and defined purpose, the subject of the grant or trust cannot be used for another and foreign purpose without the consent of the party from whom it was derived, or for whose benefit it was created. We are not considering the right of the corporation to part with whatever interest it possessed under the dedication and trust, but the power of the corporation under the legislature to deprive the owner of a lot fronting on land so dedicated. * * * It cannot be successfully contended either that the dedication of land for a highway gives to the public an unlimited use, or that the legislature have the power to encroach upon the reserved rights of the owner by materially enlarging or changing the nature of the public easement." *Elevated R. R. Case, supra.*

In respect to an easement acquired by condemnation the reason is obvious: In assessing compensation the commissioners are restricted to such damages as are incident to the specific use for which the condemnation is made. While the city authorities had ample power to confer upon the defendants a franchise to lay their tracks, erect their poles, and string their wires along the streets or sidewalks, if such franchise did not materially restrict or interfere with the public use for which it was held in trust, such power could not affect the right of abutting owners to demand compensation for any additional burden imposed upon their property. The fact that the defendant corporation was operating a public utility does not affect the question; the only difference being that if the city conferred the privilege upon a private citizen

or a corporation operating a private business, and its enjoyment interfered with the right of an abutting owner, no right to continue the use of the privilege could be acquired except by grant, whereas, if the person or corporation is conducting a business concerning the public — one conferring the right of eminent domain — the right to use the franchise or privilege may be acquired by condemnation, and paying the abutting owner compensation for the additional burden. The doctrine is well stated in *Reining v. N. Y., L. & W. R. Co., supra:*

"It is quite probable that the general interests of B. and of the larger public are promoted by this appropriation of the streets, but it by no means follows that a lot owner whose property is injured should bear the loss for the public benefit. * * * The power conferred by the charter of B. upon the common council to permit the track of a railroad to be laid in, along, or across any street or public ground must be construed as subject to the qualification that no property rights of abutting owners are thereby invaded."

In the same case GRAY, J., concurring said:

"Here the object was to subserve the railroad use, and the appropriation of this embankment is practically exclusive. The street was subjected to a new use, with consequences as direct, in the permanent deprivation of the abutting property owner's appurtenant easement, as though the railroad was operated in front of his premises upon a structure physically incapable of other uses."

In *Eels v. A. T. & T. Co.,* 5 Am. Electl. Cas. 92, 143 N. Y. 133, 38 N. E. 202, 25 L. R. A. 640, PECKHAM, J., says:

"We think neither the State nor its corporation can appropriate any portion of the public highway permanently to its own special, continuous, and exclusive use by setting up poles therein, although the purpose for which they are to be applied is to string wires thereon, and thus transmit messages for all the public at a reasonable compensation. It may be at once admitted that the purpose is a public one, although for the private gain of a corporation, but the constitution provides that private property shall not be taken for public use without compensation to the owner. Where land is dedicated or taken for a public highway, the question is, what are the uses implied in such dedication or taking? Primarily there can be no doubt that the use is for passage over the highway. The title to the fee of the highway generally remains in the adjoining owner, and he retains the ownership of the land, subject only to the public easement."

To impose any different or additional burden without compensation cannot be done by the legislature, either directly or by granting the power to a city. We cannot assume that it was intended to do so. Such intent is not to be gathered from the statute. *White v. R. Co., supra.* The question is exhaustively discussed in *Story v. N. Y. El. R. R., supra.*

There is some conflict of judicial opinion in respect to what constitutes an additional burden. The Supreme Court of Maryland, in *C. & T. Tel. Co. v. MacKenzie,* 74 Md. 36, 47, 21 Atl. 690, 693, 28 Am. St. Rep. 219, says:

"And so the condemnation of private property for a highway subjects the land so taken merely to an easement in favor of the public, and does not divest the owner of the fee. Planting telephone or telegraph posts upon a public highway in the country is an appropriation of private property, and unlawful, unless the right to do so is acquired by contract or condemnation."

After discussing the rights of the public in the street, the court proceeds to say:

"Subject to these and other like rights in the municipality and the public to the use of the street for street purposes, the owner of the fee in the bed of the street possesses the same right to demand compensation for additional servitudes placed thereon that the owner of the bed of a highway in the country is entitled to. If, then, the fee of the bed of the street be in the appellee, the planting of the pole was an additional servitude imposed upon her land, for which she could claim compensation, and the act of the assembly could not deprive her of it."

In *Broome v. Tel. Co.,* 2 Am. Electl. Cas. 259, 42 N. J. Eq. 141, 7 Atl. 851, the chancellor says:

"In order to justify the defendants in setting up the poles, it is necessary for them to show that they have acquired the right to do so, either by consent or condemnation, from the owner of the soil. The designation by the city or town authorities of the streets where the poles may be set up is not enough."

The same view is held in *B. T. Tel. Co. v. Barnett,* 107 Ill. 507, 47 Am. Rep. 453. That was an action of trespass, as the one before us. It appeared that in addition to putting the poles upon the highway, in which plaintiff owned the fee, the employees of the company "cut away the hedge because it was in their way, and they also cut down two hedge trees." The court said:

"The position taken by the defendant is that the State can rightfully, as it has done, authorize the county board to permit defendant to construct its line of telegraph upon the highway without consent of the abutting landowner; that it imposes no new or additional burden thereon, and that when the public acquire an easement over land, for a compensation fully made, the public obtain all the rights the landowner had, and the State may authorize any use of it not inconsistent with its use as a highway."

After stating the contention of the landowner, the court says:

"The latter position is the one best sustained by authority, and rests on sounder principles. * * * The principle is, neither the State nor a municipal corporation has any rightful authority, under the constitut-

grant away the private property of the citizen; and if corporations *quasi*-public, in the exercise of the right of eminent domain with which they are clothed by the sovereign power of the state, seek to appropriate it so that they may have a benefit therefrom, every principle of justice demands that they should make just compensation, whether the property taken is of little or great value. But aside from all considerations of right and justice, the constitution has so declared, and its mandate in that respect may not be disregarded." *Ind., B. & W. R. R. v. Hartley*, 67 Ill. 439, 16 Am. Rep. 624; *Willis v. Erie T. & T. Co.*, 37 Minn. 347, 34 N. W. 337; *Stowers v. Postal Tel. Co.* (Miss.), 3 Am. Electl. Cas. 855; Joyce on Electl. Law, § 321.

That shade trees may not be removed, except when necessary for the use of the street by the public, is well settled. Lewis, Em. Dom., § 132. There are some authorities to the contrary, but we think the view taken by those cited the sound one.

We have no hesitation in holding that assuming that the board of aldermen of the city of Asheville had met and formally granted to the defendants authority to remove the tree, finding that its removal was necessary to put up its poles and wires either for the electric light or street railway upon and along the sidewalk, such action would not have justified the act of defendants. It was not within the power of the city to deprive the plaintiff of his property for such purpose without compensation. We find, however, no averment or evidence that it was necessary to remove the tree. It is suggested that it was more convenient to place the poles and string the wires with the tree out of the way. This falls far short of the essential conditions upon which private property may be taken, or burdens imposed upon it. The right of eminent domain has been so freely conferred upon corporations, upon the mere suggestion that their business is in some way connected with service to the public, that we are in danger of forgetting that it is one of the most delicate and dangerous powers conferred by the people upon their government. Public franchises have been so generously and lavishly conferred and so freely used without compensation that those who wish to enjoy them forget that one of the chief ends for which government is created and taxes paid is the protection of private property, and then only with compensation. The record in this case shows that a valuable right of property, affecting the comfort, health, and welfare of the citizen and his family, has been taken, upon the suggestion of a private corporation to the superintendent of streets, without inquiry by the board of aldermen, notice to the plaintiff,

or any opportunity to be heard in defense of his rights. No person shall be deprived of his property, except by the law of the land, or due process of law, which has been defined to mean the right to be heard before he or his property is condemned. This sacred right is binding upon every department of the government, and all of its agencies, including municipal and private corporations.

While it is held in *Tate v. Greensboro, supra,* that the power to remove shade trees, where their removal is necessary for the use of the street as a public highway, may be conferred upon the street committee, it would be more in accordance with due and orderly procedure to do so only after due notice to the owner, and a hearing before the legislative body of the city. The tree was cut on March 21, 1901. This action was brought on July 5, 1901. On September 16, 1904, the board of aldermen adopted a resolution reciting that the action of three corporations named "or one or more of them in cutting down and removing the tree in front of the place then owned and occupied by B. C. Brown," etc., "some years ago in putting a line of street railway and appurtenances upon said street in front of said property, or replacing thereon certain light wires be and is hereby ratified and confirmed, said tree having been so cut and removed by direction of the proper authorities of the said city." It is evident that at the time of the passage of this resolution the board were not certain to what corporation the power was given to cut the tree, or for what purpose it was conferred. It is not suggested in the resolution that it was necessary to remove the tree, or that it interfered with the street railway or the light wires. Indeed, it is apparent that the board knew but little about the matter which they "ratified and confirmed."

We have discussed the case upon the assumption that the tree was on the sidewalk. The testimony shows that, while the condemnation took place in 1892, the land had never been used as a sidewalk. The plaintiff testified without contradiction that he had at the time the tree was cut lived at the place six years, and "there had never been any sidewalk there." The tree was removed in March, 1901, and the hole out of which it was taken, "about ten feet square," was open at the time of the trial. The testimony further shows that the tree was cut by the superintendent of the

defendant companies while Mr. Brown was away from home; that when his wife phoned him, and he directed her to forbid the removal of the tree, the parties gave no heed to her request; and that in some way the wires connecting the phone were cut.

We are impressed with the wisdom of the words of Judge PECKHAM in concluding his opinion in *Eels v. A. T. & T. Co., supra.* Referring to the argument that cases of this character should be decided with reference to the wants of an advancing civilization, which is doing so much to render life more comfortable and attractive, he says:

> "Let the defendants pay the owners for the value of the use it makes of the land outside and beyond the public easement in the highway, and the necessity of the broader decision is done away with. It has the power to take the land upon making compensation, and hence the refusal of the owner will not stop the proposed undertaking."

We have carefully examined the record and the exceptions to his honor's rulings. We find no error of which the defendants can complain. We are of the opinion that the allegations were sufficient to entitle the plaintiff to demand exemplary and punitive damages, and the testimony shows ample ground upon which to base the claim. In the entire transaction there was on the part of the defendants a painful disregard of the rights of the plaintiff. While extensive powers and wide discretion are given municipal authorities for the discharge of their duty to the public, it should always be borne in mind by those who serve in public positions that in our system of government there is no room or place for

WOOD v. WILMINGTON CITY RY. CO.

Delaware Superior Court — June 7, 1905.

5 Pen. (Del.) 369, 64 Atl. 246.

1. ELECTRIC RAILWAYS — INJURY TO HORSE FROM LIVE RAIL — PROOF. — In an action against an electric railway for injuries to a horse by a shock from a rail, the plaintiff in order to recover must show by a preponderance of evidence: (1) That the injury to the horse was by an electric current; (2) that the electric current came from the railway track of the defendant; (3) that the current so came by reason of the negligence of the defendant.
2. SAME — PRESUMPTION OF NEGLIGENCE. — Where an accident itself, with all its surroundings, speaks in such a way and is of such a character as to show negligence on the part of the defendant, it imposes upon such defendant the burden of rebutting such negligence by proof.
3. SAME — CARE REQUIRED. — Electricity is known to be a very dangerous element, and in its use in the streets of a city an electric railway company is bound to use due care and caution for the prevention of accident, such care must always be in proportion to the danger of the surroundings and to the character of the appliances used for electric purposes.

Action to recover damages for the value of a horse, injured by a shock from stepping on the street car tracks of the defendant company, and subsequently shot upon the advice of a veterinary surgeon. Verdict for plaintiff.

Before LORE, C. J., and GRUBB and PENNEWILL, JJ.

Levin Irving Handy, for plaintiffs.

Walter H. Hayes, George N. Davis, and *Andrew C. Gray,* for defendant.

Injury to Horses from Rail Charged with Electricity. — Where a horse was injured while crossing the track of an electric railway by contact with a live rail, plaintiff was entitled to offer evidence to show by a continuous series of instances that other horses had received similar shocks by stepping on the tracks of such company at other places on its line. *Vicksburg Ry. & Light Co. v. Miles, post,* 4 St. Ry. Rep. 556, 40 So. 748.

The facts that a horse stepped on the rail of a trolley road and immediately fell to the ground in a dying condition, also that its driver, touching the harness received a severe shock, constitute *prima facie* proof of negligence on the part of the railway company. *Clark v. Nassau Electric R. R. Co.,* 6 Am. Electl. Cas. 234, 9 App. Div. 51, 41 N. Y. Supp. 78. Escape of electricity from street railway tracks to the injury of a horse, being driven across such tracks, is presumptive proof of negligence in the operation of the railway. *Trenton Passenger Ry. Co. v. Cooper,* 60 N. J. L. 219.

At the trial the defendant admitted that it owned and was operating the road where the accident happened, at the time of the accident, by the motive power of electricity, and the plaintiff admitted that the defendant was lawfully operating said road at the time and place aforesaid. When the plaintiff rested, counsel for defendant moved for a nonsuit on the following grounds: First. Because there was no evidence that the electric current which was in the rail was put there by the defendant company. Second. Because there was no proof of any defect in the bonding of the rails by means of which the electric current could escape, and no proof of notice to defendant of any such defect; the proof, as contended, being simply that when the horse stepped upon the rail he received a shock and that the only way the current could escape would be through imperfect bonding of the rails. *Boudwin v. W. C. Railway*, 4 Pennewill, 381, 384, 60 Atl. 865; *Colbourn v. Mayor and Council*, 8 Am. Electl. Cas. 457, 4 Pennewill, 443, 56 Atl. 605; *Punkowski v. New Castle Leather Co.*, 4 Pennewill, 544, 550, 57 Atl. 559; *Reed v. Queen Anne's Railroad*, 4 Pennewill, 413, 57 Atl. 529; *Betts v. W. C. Railway*, 3 Pennewill, 448, 53 Atl. 358; *Green v. Newark* (Del.), 62 Atl. 792.

Mr. Handy, for plaintiff, in reply to the first proposition urged in support of the motion for a nonsuit, contended that the admission of the defendants made at the opening of the case, viz., that their trolley cars were operated over the tracks at the time and place of the accident by means of electricity, rendered it unnecessary for plaintiff to prove that the electric current was placed in the track by the defendant company, and moreover, that there was proof that about the time of the accident a car was passing over the same track on which the horse was injured and but a short distance away, and that there was further testimony that the current from the wire was communicated through the trolley pole to the car, passing through the same and into the rails, through which it was returned to the power house. As to the second proposition, Mr. Handy contended that having shown by the testimony that the horse received a shock of electricity by stepping upon the rail of the defendant company's roadbed, and that having proved that if the bond connection between the separate pieces of rail had been made properly no shock could have been received by the horse, such facts and circumstances were proper evidence to go to the jury from which they could draw the reasonable inference that the bonding was not in perfect condition; that in a case like the present one, where a railway is using a dangerous agency like electricity along the surface of the streets of a city, the doctrine of "*res ipsa loquitur*" applies, and the fact that the injury occurred is evidence of negligence on the part of the defendant company in not properly inspecting and not preventing such a dangerous condition from existing in its tracks. *Trenton Passenger Railway Company v. Cooper* (N. J. Err. & App.), 37 Atl. 730, 38 L. R. A. 637, 64 Am. St. Rep. 592; *Same v. Bennett*, Id.; *Western Union Telegraph Company of Baltimore City & Lebanon Railway Company v. State of Maryland, Use of Edward Nelson*, 6 Am. Electl. Cas. 210, 82 Md. 293, 33 Atl. 763, 31 L. R. A. 572, 51 Am. St. Rep. 464; *Thomas v. Western Union Telegraph Co.*, 100 Mass. 156; *Excelsior Electric Co. v. Sweet*, 57 N. J. Law, 224, 30 Atl. 553; *Bahr v. Lombard, Ayers & Co.*, 53 N. J. Law, 233, 21 Atl. 190, 23 Atl. 167; *Alexander v. Nanticoke Light Co.* (Pa.), 9 Am. Electl. Cas. —, 58 Atl. 1068, 67 L. R. A. 475; *Sweeney v. Jessup & Moore Paper Co.*, 4 Pennewill, 284, 287, 54 Atl. 954.

Opinion by LORE, C. J.:

A majority of the court think that the nonsuit should not be granted.

LORE, C. J. (charging the jury):

This is an action brought by J. R. and W. R. Wood against the Wilmington City Railway Company, to recover damages for injuries done to the horse of the plaintiffs on Eighth street, in this city, between French and King streets, on the 16th day of June, 1903. The allegation is that one of the plaintiffs was driving westwardly on Eighth street, and that his horse, stepping upon one of the rails of the company, received an electric shock, from which he was injured, and because of that injury was shot. The plaintiffs claim that the electric current so put through their horse came from the rails of the company, and by reason of the negligence or want of care on the part of the defendant company.

This action is based upon the negligence of the defendant; and in order to recover it is incumbent upon the plaintiffs to show to your satisfaction, by a preponderance of the proof, three things: (1) That the injury to the horse was by an electric current as is alleged in the declaration; (2) that the electric current came from the railway track of the defendant company; (3) that the current so came by reason of the fault or negligence of the said defendant.

Negligence is never presumed. It must be proved. The plaintiffs, however, in this case claim the benefit of the doctrine of "*res ipsa loquitur;*" that is, that the accident itself, with all its surroundings, speaks in such way and is of such a character as to show negligence on the part of the defendant company. And that imposes upon it the burden of rebutting such negligence by proof. This may be one mode of showing that there is proof of negligence, and, if negligence is shown, then that negligence must be met, or the plaintiffs are entitled to recover.

In this case it is admitted that the defendant company was operating a railway by electricity at the time and at the place of the accident. Electricity is known to be a very dangerous element, and in its use in the streets of the city by an electric railway company there is imposed upon the person using it the duty of due care and caution for the prevention of accident and for the protection of persons using such streets or highways; and such

care must always be in proportion to the danger of the surroundings and to the character of the appliances used for electric purposes. If such due care is used, and still accidents happen, there will be no liability, because there exists no negligence. The necessity for the use of electricity as a motive power in this day, for the public accommodation, is a matter of common knowledge and recognition. It is authorized by law, but in its use there must be the exercise of due care.

Whether there be evidence of negligence in an accident must be determined by the facts of each particular case. Where an electric railway is under the control and management of a company, and the accident is of such a character as to show that it could not have happened in the ordinary course of events under reasonably careful management, it affords some evidence, in the absence of any explanation, that the accident rose from the want of care; but, if it is satisfactorily shown that the defect which it is claimed caused the accident did not exist at the time of the accident, negligence would be rebutted.

If you believe from the evidence that the horse of the plaintiffs was injured by an electric shock received from the railway track of the defendant company, and that the injury would not have happened if the defendant company had exercised all the care and precaution which it should have exercised under the circumstances, then your verdict should be for the plaintiffs, and for such sum as would reasonably compensate them for their loss. If the injury to the horse arose from any other cause than the electric shock, or

ROSENSTEIN v. FAIR HAVEN & W. R. CO.

Connecticut Supreme Court of Errors — June 9, 1905.

78 Conn. 29, 60 Atl. 1061.

1. ESCAPING ELECTRICITY — SHOCK TO HORSE BY STEPPING IN WATER — INSTRUCTIONS. — In an action for damages sustained by a horse receiving a shock by stepping into a pool of water charged by electricity escaping from defendant's wires and iron poles, the court read to the jury the defendant's request to charge, to the effect that there was no contractual relation between the plaintiffs and the defendant, and that the latter was not an insurer of the plaintiffs' safety from injury by the escape of electricity from its wires, and refused to so charge. There were requests by the plaintiff which made defendant an insurer. *Held*, that this was prejudicial error as to defendant.
2. SAME — INSTRUCTIONS — CONTRIBUTORY NEGLIGENCE. — As to plaintiff's contributory negligence, the jury were once in effect told that the pleadings did not raise that issue. Elsewhere, pursuant to one of the defendant's requests, they were correctly told otherwise. *Held*, that this was erroneous as to defendant.

Appeal by defendant from judgment for plaintiff. *Reversed.*

Harry G. Day and *Henry H. Townshend,* for appellant.

Maxwell Slade and *David H. Slade,* for appellees.

Opinion by PRENTICE, J.:

These two cases arose out of the same occurrence, and were tried together. The plaintiffs claimed to have proven that the plaintiff in the first case, a member of the copartnership plaintiff in the second, was driving with a horse, wagon, and harness belonging to said copartnership through one of the streets of New Haven through which the defendant operates a double-track, overhead, electric trolley line, when, approaching the curb, the horse stepped into a pool of water, and thereby became shocked with electricity which was escaping from the defendant's wires and iron poles used in transmitting the electric current employed by it in the operation of its cars, leaped into the air, and fell to the ground, thereby injuring the horse, wagon, and harness, and throwing said plaintiff out upon the ground, severely injuring him. They claimed also to have proved that said escape of electricity was due to the defendant's failure to perform its duty under the circumstances. The allegations of the complaint charging negligence on the part of the defendant, and averring the absence of contributory

negligence on the part of the plaintiff, were denied; and the defendant claimed to have proven that it did its full duty in the premises, and that the accident was due to no failure on its part to exercise the high degree of care required of it under the circumstances.

All the assignments of error, save only a single one in the latter case, relate to the charge. Specific errors in the instructions given are pointed out, but the complaint which is the dominating one, and which gathers around it most, if not all, of the others, is one that the charge, taken as a whole, was so indefinite and uncertain in its terms, so contradictory in its parts, and so inadequate in its scope and tenor, that it furnished no proper guidance for the jury.

It was incumbent upon the court to state to the jury the issues which were presented for its determination upon the evidence, and such principles of law as might be necessary for their proper determination upon the facts as they should be found to exist. This statement it was the duty of the court to make in as simple, orderly, clear, and precise a manner as it reasonably could under the circumstances. In the performance of its duty in the present cases, the court confined its own personal instructions to a few general observations at the beginning of the charge. These contained a few sentences only, which were devoted to an explanation of the issues or the law pertinent to their decision. The balance of the charge was confined entirely to a reading of the numerous requests filed by counsel, and the commendation of all save two of those presented by the defendant as embodying a correct statement of the law, and an elaboration of a third by adding a quotation from an opinion of this court. These instructions fill five pages of the printed record. The not unnatural result of this objectionable method was that a mass of unarranged and disjointed matter prepared by counsel in a partisan spirit and for a partisan purpose, extreme and partial in many of its statements, frequently argumentative in its character, and unmindful throughout of the true perspective of the case, was given to the jury, more perhaps to its confusion than its enlightenment. Had the subject-matter of these requests been unexceptionable in law, the purpose of a charge could scarcely have been well accomplished by the method employed. *State v. Rathbun*, 74 Conn. 524, 51 Atl. 540; *Aikin v. Weckerly*, 19 Mich. 482. In the present instance the

normal dangers incident to the instruction of jurors in the manner indicated were aggravated by the fact that the court was thus led into giving instruction upon vital matters in erroneous and contradictory ways, thus adding error and inconsistency to the list of the faults of the charge. An instance or two will illustrate the situation: The extent of the defendant's duty in the premises was, of course, a vital feature of the case, and it was all-important that instructions should be given which clearly and intelligently declared the law. The court read to the jury the defendant's fourth request, to the effect that there was no contractual relation between the plaintiffs and the defendant, and that the latter was not an insurer of the plaintiff's safety from injury by the escape of electricity from its wires, and refused to so charge. This express disapproval of a sound proposition was accompanied by instructions contained in the plaintiffs' requests which in effect made the defendant an insurer. Through the medium of other requests the true rule of duty as defined by this court in *McAdam v. Central Ry. & Lt. Co.*, 6 Am. Electl. Cas. 348, 67 Conn. 445, 35 Atl. 341, was stated. Elsewhere in the plaintiffs' requests other measures of the defendant's duty were given. Attempts to deal with this subject constantly recur, especially in the plaintiffs' requests, and it is always dealt with in a different way. These attempts are usually incidental to an effort to have the plaintiffs' right to a judgment argumentatively enforced. The result, however, was that varying and wholly contradictory standards of duty were given to the jury for their use in determining the question of the defendant's discharge or nondischarge of its duty to the plaintiff, and they were left to reach their conclusion upon the issue as to the defendant's negligence without proper guidance. Again, upon the subject of the plaintiff's contributory negligence, the jury were once in effect told that the pleadings did not raise that issue. Elsewhere, pursuant to one of the defendant's requests, they were correctly told otherwise.

It is attempted to justify the instructions, notwithstanding these inconsistencies, upon the ground that the charge should be judged as a whole, and that when so judged it would appear that a substantially correct and proper charge was given, and the jury correctly guided. Notwithstanding the correct proposition of law upon which this contention is based, it has already been made

sufficiently apparent that its subordinate proposition of fact is one so wholly without support that further discussion is unnecessary. *State v. Scheele*, 57 Conn. 307, 18 Atl. 256, 14 Am. St. Rep. 106; *Lutton v. Vernon*, 62 Conn. 1, 23 Atl. 1020, 27 Atl. 589; *Smith v. King*, 62 Conn. 515, 26 Atl. 1059; *State v. Kallaher*, 70 Conn. 398, 39 Atl. 606, 66 Am. St. Rep. 116; *State v. Rathbun*, 74 Conn. 524, 51 Atl. 540.

One of the plaintiffs in the second action testified as a witness in chief that the horse was bought about two years before the accident; that he was about seven years old, and had at all times been sound and well, and capable of doing full work. He was then asked, as bearing upon the amount of damages recoverable, what, in his opinion, the horse was worth before and after the accident. He replied from $200 to $225 before the accident, and only $50 thereafter. Upon cross-examination he was asked what he paid for the horse. Upon objection the inquiry was not permitted. The cross-examiner was thus improperly deprived of his right to thus test the opinion of the witness as to value, and, if possible, demonstrate his error. Wigmore on Ev., §§ 464, 1006. Later the defendant offered the testimony of the vendor of the horse as to the purchase price, and that was excluded. This ruling stands upon a different basis from that just considered. It is doubtless true, as is frequently said, that the cost of property is ordinarily some evidence of its value. *Hawver v. Bell*, 141 N. Y. 140, 36 N. E. 6; *Kendrick v. Beard*, 90 Mich. 589, 51 N. W. 645. It is not true, however, that cost is so indicative of value at times, however far removed or under circumstances however changed, that it deserves to be received in proof of such value. *Miner v.*

ercise a considerable measure of discretion in determining whether a given piece of testimony which may be logically probative of a fact in issue ought, in view of the considerations suggested and others recognized by the authorities, to be received. Thayer's Treatise, *supra*. And so it is that the admission of evidence like that here presented is not to be determined by an arbitrary rule, but by considerations which ought to influence the exercise by the court of a sound, but not unlimited or unreviewable, discretion, in view of all the circumstances of each case. It is unnecessary to pursue this subject further, to inquire whether there was in this case any exercise or abuse of this discretion, since, upon the new trial which must be granted, it is to be assumed that, in view of these observations, a proper course will be taken.

There is error, and a new trial is granted. All concur.

PATTERSON v. SAN FRANCISCO & S. M. ELECTRIC RAILWAY CO.

California Supreme Court — June 20, 1905.

4 St. Ry. Rep. 44, 147 Cal. 178, 81 Pac. 531.

1. INJURY TO PASSENGER FRIGHTENED BY ELECTRICAL DISTURBANCE IN CAR.— Where a passenger received injuries alleged to have resulted from emission of flames from the electric apparatus of the car, or of such magnitude that he was justified in jumping from the car, and the evidence on the ther hand tended to show that the flash was of a slight character, accompanied by but a slight noise, together with evidence that plaintiff was not only not thrown from the car but that he rushed out of the car and immediately jumped from it, which he acknowledged to those going to his assistance, admitting his foolishness in having jumped at all, and where the evidence further showed that all of the other passengers

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Injuries to Passengers. — For other cases in this volume, see *McRae v. Met. St. Ry. Co., post*, 5 St. Ry. Rep. 636, 102 S. W. 1032 (injury by stepping on electrified plate in car); *Williams v. N. Y. & Queens County Ry. Co., ante*, 97 App. Div. 133, 89 N. Y. Supp. 659; *Brod v. St. Louis Transit Co., post*, 5 St. Ry. Rep. 645, 91 S. W. 993 (injury during confusion resulting from explosion); *Dowling v. Brooklyn Heights Ry. Co., post*, 4 St. Ry. Rep. 849, 107 App. Div. 312, 95 N. Y. Supp. 107 (sudden stopping of a car caused by explosion); *Blumenthal v. Union Electric Co., post*, 4 St. Ry. Rep. 303, 129 Ia. 322, 105 N. W. 588 (jumping from car, being frightened by electrical disturbance); *Chretian v. New Orleans Railways Co., ante*, 37 So. 716 (jumping from car, being frightened by an explosion caused by a broken wire striking the car); *Hopkins v. Mich. Traction Co., post.*, 144 Mich. 359, 107

remained in the car, as the evidence was conflicting on the material points in issue it was for the jury to determine what credit should be given to it, and their verdict could not be disturbed on appeal.

2. SAME — EVIDENCE IN REBUTTAL. — The court did not err in refusing to permit plaintiff to inquire of certain witnesses called by him in rebuttal as to the extent of the flashes and the extent of what was claimed by plaintiff to have been the accompanying explosion, as these matters were gone into fully by plaintiff in his main case.

3. SAME — BURDEN OF PROOF — PREPONDERANCE OF EVIDENCE — PRESUMPTION OF NEGLIGENCE. — Although a presumption of negligence arose against the defendant by proof that plaintiff was a passenger, that the explosion and flash of the controller took place and that he was injured, and although it became necessary by reason of this presumption for the defendant to meet and overcome it, the burden of proof did not shift from the plaintiff to the defendant, and it was proper to so charge the jury and also to charge that if the company introduces sufficient evidence simply to balance such presumption without overcoming it by a preponderance of evidence, the presumption is overcome.

4. NEW TRIAL ON ACCOUNT OF NEWLY DISCOVERED EVIDENCE. — Where newly discovered evidence was simply cumulative, it was not good cause for a new trial.

Plaintiff appeals from judgment for defendant. *Affirmed.*

William J. Herrin, for appellant.

A. A. Moore and *Peter F. Dunne* for respondent.

Opinion by LORIGAN, J.:

In this action plaintiff sought to recover damages for personal injuries alleged to have been sustained through the negligence of defendant. A verdict was returned in favor of defendant, and plaintiff appeals from the judgment, and an order denying his motion for a new trial.

1. On March 12, 1901, about midnight, plaintiff and his wife took passage on one of the cars of defendant, at the corner of

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N. W. 909 (contact with live wire suspended from roof of car); *Stern v. Westchester Electric Ry. Co., ante,* 99 App. Div. 491, 90 N. Y. Supp. 870 (jumping from car in confusion resulting from breaking of span wire attached to trolley wire); *Firebangle v. Seattle Electric Co., post,* 4 St. Ry. Rep. 1055, 40 Wash. 658, 82 Pac. 995 (jumping from car because of explosion from the controller); *South Covington & Cincinnati St. Ry. Co. v. Smith, ante,* 3 St. Ry. Rep. 264, 86 S. W. 970 (passenger thrown against controller box by lurch of car, and sustained shock); *Williamson v. St. Louis Transit Co., post,* 5 St. Ry. Rep. 649, 202 Mo. 340, 100 S. W. 1072 (jumping from car being frightened by explosion in controller); *German v. Brooklyn Heights Ry. Co., post,* 4 St. Ry. Rep. 848, 107 App. Div. 354, 95 N. Y. Supp. 712 (rush caused by explosion of controller on car passing upon an adjoining track).

Fourteenth and Valencia streets, in the city of San Francisco, for their home on Thirtieth street in said city. The car turned into Guerrero street, and as it approached Twenty-second street the motorman threw off the current to pass an overhead division of the trolley line, when flames flashed noisly out of the front controller of the iron incasement in electric cars, to which the motorman affixes the speed lever. When this occurred, the motorman immediately turned and motioned to the conductor at the rear end of the car to disconnect the "overhead" or current running from the first controller to the rear one, and this the conductor forthwith did at a point next to the roof of the car and close to the rear end. This disconnecting likewise caused a flame or flash, accompanied also with a noise. The evidence is conflicting as to the extent of the flames or flashes which proceeded from the front controller, and the disconnecting of the current at the rear of the car, and the degree of the noise accompanying them. There was some evidence that the flames or flashes were extensive, and the noises accompanying them very loud, amounting to reports or explosions. On the other hand, there was evidence to the effect that the flame from the front controller flashed eight or ten inches high, accompanied by but a slight noise, and that the effect of disconnecting the overhead current on the rear platform occasioned but a slight flash and a slight sizzling, or sputtering noise, characteristic of arc lights or short electrical disconnections. However, when the flash from the front controller took place, plaintiff immediately jumped from his seat and rushed out towards the rear platform. What next took place is again a matter of dispute under the evidence. Plaintiff testified that as he reached the rear platform the flash from the overhead disconnection occurred, accompanied by a loud report; that it appeared to him that the whole of the rear end of the car was on fire; that the flash completely blinded him, which was the last he remembered, except that he felt a peculiar sensation as of flying through the air; that he knew nothing more until he found himself over against a curb on the street with his leg broken. Opposed to plaintiff's claim in this particular was evidence tending to show, as before stated, the slight character of the flash from the controller and in disconnecting the overhead current on the rear platform, and the slight noises accompany-

ing both, together with evidence that plaintiff not only was not blown off the car by force of an explosion, as his testimony would indicate, but that he rushed out of the car and immediately jumped from it; that he so stated when persons went to his assistance, and further declared that it was foolish for him to have jumped at all. The evidence further showed that there were five other persons besides plaintiff, including his wife, all seated inside the car, none of whom were hurt, and all of whom remained on the car until it stopped. Evidence was also introduced on the part of defendant to show that the controllers upon the car had been examined some three days before the accident, and were then in perfectly good order and condition. We state this evidence, and refer to the conflict in it, not only for the purpose of giving the general facts, but also in view of the claim of appellant that the verdict of the jury was not sustained by the evidence. The claim of defendant before the jury, under the evidence, was twofold: First, that the flashes, with their accompanying noises, be the character of them what they may, happened without any negligence on the part of defendant; and, second, that they were so slight and unimportant that the plaintiff, by reason of them, was not placed in any situation of peril, real or apparent, which would justify an ordinarily reasonable man, or a man of average prudence, in pursuing the course which he did. By rendering a verdict for defendant the jury necessarily found, from the evidence, in favor of defendant on one or both of these propositions. As the evidence was conflicting on the material points in issue, it was for the jury to determine what credit should be given to it. They determined that the evidence in support of respondent's position was the more convincing, and, as that was sufficient to support their verdict, we cannot disturb it.

2. It is claimed that the court erred in refusing to permit appellant to inquire of certain witnesses, called by him in rebuttal, as to the extent of the flashes, and the extent of what was claimed by appellant to have been the accompanying explosions. This the court refused, on objection of respondent, to permit, as not being rebuttal evidence, and we think the ruling was correct. These matters were gone into fully by appellant in presentation of his main case. In fact, it is quite apparent that the theories of the appellant upon which he sought to re-

cover were that either he was hurled off the car by force of an explosion on the rear platform, or that the flashes and explosions were of such extent and magnitude that, as a reasonable man, he was warranted in apprehending danger and taking the course he did to escape it. On these theories he went fully into the matter of the flashes and explosions in presenting his main case, and, if he had any additional testimony on those points, then was the time to have presented it. While it was within the discretion of the court to allow, for good cause shown, the admission of evidence in rebuttal which should have been introduced in presenting the main case, still there was no reason suggested why this evidence was not presented at that time, and so it was properly rejected on rebuttal.

3. Complaint is made that the court erred in many of the instructions which it gave to the jury, and in its refusal to give certain instructions requested by appellant. It will be unnecessary to set forth the requested instructions which it is claimed should have been given. We are satisfied that the court committed no error in refusing them. They consist of two instructions with reference to the degree of care to be exercised by a common carrier of passengers, and one relative to the rule of law under which the conduct of a party when placed in a position of peril is to be measured. Without discussing the objections urged against these instructions — that they did not completely state the law, save the one which was a verbatim copy of section 2100 of the Civil Code — a careful consideration of all the instructions which were given by the court shows that the jury were clearly and fully instructed on both these subjects. As to the instructions which were given and are challenged, the court instructed the jury:

"In this case the plaintiff, George W. H. Patterson, claims to have received personal injuries through the negligence of the railroad company defendant. The plaintiff assigns the defendant's negligence as the cause of his alleged injuries. The law requires that he prove such negligence. As the plaintiff, he has the affirmative of that issue. Unless the plaintiff makes this proof, and shows negligence on the part of the defendant, by a preponderance of the whole evidence, he cannot recover herein, and your verdict must be for the defendant."

And again:

"I instruct you, as matter of law, that any presumption of defective condition, arising from any flashing, smoking, *or report of* any machinery or

appliances of defendant in this case, need not be overcome by the railroad company by any preponderance of the evidence. If the railroad company introduces sufficient evidence simply to balance such a presumption, without overcoming it by a preponderance of evidence, the presumption is overcome."

It is claimed that that portion of the first of these instructions which states that the plaintiff has the affirmative of the issue was erroneous, the argument of plaintiff being that, having proven he was a passenger on the car, that the explosions and flashings of the controllers took place, and that he was injured, he established a *prima facie* case, which cast the burden of proof upon defendant to show, in order to absolve itself from liability, that the injury was the result of unavoidable accident, or one which the utmost care and foresight on the part of the defendant could not have prevented — that to this extent the affirmative was on the defendant. This contention, however, does not make the proper distinction between the weight of evidence and the burden of proof, applied in its strict sense as used in the instruction. Plaintiff charged negligence, and made out a *prima facie* case by the aid of a presumption. The burden was then cast on defendant to show by the weight of evidence that it was not negligent, or to overcome the presumption. But because it was necessary, by reason of this presumption, for the defendant to meet or overcome it, did not shift the burden of proof, in its strict sense, from the plaintiff to defendant. When the evidence was all in, the burden of proof on the question of negligence remained with the party who originally took it — the plaintiff. Under the pleadings he had the affirmative of that issue; he alleged negligence, and the law cast on him the obliga-

tion quoted above, where the jury were told that if the defendant introduced sufficient evidence to balance the presumption arising in favor of plaintiff from the proof of a *prima facie* case, without overcoming such presumption with a preponderance of evidence, the presumption was overcome. It is claimed by appellant that this presumption can only be overcome by a preponderance of the evidence. But this cannot be so. Before a plaintiff is entitled to recover in any action, he must have a preponderance of evidence in his favor. If the evidence offered on the part of a defendant leaves the weight of evidence in a case equally balanced, there cannot exist that preponderance of evidence in plaintiff's favor which the law requires shall exist in order to warrant a recovery. To say that the plaintiff can recover when the weight of the evidence is equally balanced, and there has been no preponderance on either side, is to say that the plaintiff can recover without a preponderance of evidence, which is, of course, legally impossible.

The rule as stated in the instruction under review is sustained by the reasoning in *Scott v. Wood, supra,* as we understand that case. And such cases as are called to our attention from elsewhere support this doctrine. In *Kay v. Metropolitan R. R. Co.,* 163 N. Y. 447, 57 N. E. 751, plaintiff, in a collision between the street cars of defendant, was injured, and recovered a judgment. On the trial the court instructed the jury that the burden of proving affirmatively that it was free from negligence was on the defendant. That instruction, on appeal, the Supreme Court held to be erroneous, saying (and this decision also deals with the question of burden of proof we have previously discussed):

"The plaintiff, upon the issue of negligence, had to meet the burden of proof at every stage of the case. When a party alleges the existence of a fact as the basis of a cause of action or defense, the burden is always upon the party who alleges it to establish it by proof. The *onus probandi* is upon him throughout. In the case at bar, the plaintiff made out her cause of action *prima facie* by the aid of a legal presumption; but, when the proof was all in, the burden of proof had not shifted, but was still on the plaintiff. . . . If the defendant's proof operated to rebut the presumption upon which the plaintiff relied, or if it left the essential fact of negligence in doubt and uncertainty, the party who made that allegation should suffer, and not her adversary. The jury were bound to put the facts and circumstances proved by the defendant into the scale against the presumption upon which the plaintiff relied, and, in determining the weight to be given to the former as

against the latter, they were bound to apply the rule that the burden of proof was upon the plaintiff. If, on the whole, the scale did not preponderate in favor of the presumption, and against the defendant's proof, the plaintiff had not made out her case, since she failed to meet and overcome the burden of proof."

In *Mex. Central R. R. Co. v. Lauricella,* 87 Tex. 277, 28 S. W. 277, 47 Am. St. Rep. 103, plaintiff was injured, while a passenger, in a derailment. The jury were instructed that, unless the railroad company overcame the presumption of negligence arising from the proof of derailment, they should find in favor of plaintiff. This instruction, on appeal, was held erroneous, the court saying:

"Although the derailment of the train may have been sufficient to raise the presumption of negligence, yet it did not devolve upon the defendant the duty of showing, by evidence of a preponderating weight, that the accident was not the result of negligence. It was entitled to a verdict if the evidence upon the issue was balanced; that is, if it preponderated on neither side."

These are the only instructions given by the court and challenged which we deem specially worth noticing. The other instructions criticised correctly state the law, and present no questions which require particular discussion.

4. One of the grounds of the motion for a new trial was on account of newly discovered evidence. This consisted of the testimony of two witnesses, who would testify solely upon the question of the extent of the flashes and the loudness of the reports accompanying them. This matter was all gone into upon the trial, so that the newly discovered evidence was simply cumulative. Hence it was not good cause for a new trial. *Reed v. Clark,* 47 Cal. 194, 204. This disposes of all the points made on this appeal which in our judgment require consideration, and, finding no error in the record warranting a reversal, the judgment and order are affirmed.

MILLER v. LEWISTOWN ELECTRIC LIGHT, HEAT & POWER CO.

Pennsylvania Supreme Court — June 22, 1905.

212 Pa. 593, 62 Atl. 32.

1. LOWERED ARC LIGHT — INJURY TO PEDESTRIAN BY WIRES — NEGLIGENCE OF LIGHTING COMPANY — QUESTION FOR JURY. — Plaintiff was injured while crossing a street by being struck by wires connected with an arc light which had been lowered and left in charge of a boy by defendant's employee. *Held*, that the question of defendant's negligence was for the jury.
2. SAME — CONTRIBUTORY NEGLIGENCE. — The question, whether the plaintiff was guilty of contributory negligence, in crossing the street at a place, other than the regular crossing, was for the jury.

Appeal by defendant from verdict for plaintiff. *Affirmed.*

At the trial it appeared that plaintiff was seriously injured by contact with electric light wires belonging to the defendant company. At a point in the borough of Lewistown where several streets intersected, the defendant maintained an arc light, which on the evening in question had been lowered for repairs. An employee of the company, after lowering the light, left it in charge of a boy while he went to secure a file. During his absence a one-horse sleigh dashed around a corner and struck the wires attached to the lamp. The testimony tended to show that Miller, while attempting to cross one of the streets at a point other than the regular crossing, was struck by the wires and sustained injuries, from which he died after the present suit was instituted.

Defendant presented the following points:

"(4) If the jury believe that it is the custom to lower arc lamps at night on public highways for the purpose of making them operate, and that in this case the lamp, when lowered, was left in charge of a boy, to notify the public of possible danger in the short and necessary absence of defendant's employee, then their verdict must be for the defendant." Answer: This point is denied. The question as to whether leaving the light in charge of the boy was negligence or not is for you to determine, and not for the court; and an electric light company could not have a custom, unless the custom had been established by many long years, so as to become universal and known by all persons, to negligently lower lights at night.

"(6) From all the evidence in the case the verdict must be for the defendant." Answer: This point is denied. It is for you to say what your verdict will be, not for the court.

Before MITCHELL, C. J., and FELL, BROWN, POTTER, and ELKIN, JJ.

A. Reed Hayes, for appellant.

Maintenance of Arc Lights in Streets. — See note to *Louisville Lighting Co. v. Owens, post.*

W. W. Uttley, for appellee.

Opinion PER CURIAM:

Whether the defendant's conduct in lowering the lamp, or leaving it in charge of a boy, while the wires were down, was negligent, was a question for the jury. There could be no custom of the defendant which would excuse it for exposing the public to what the jury should find was unnecessary danger.

The question of proximate cause was also for the jury. The fact that the horse was going at a rapid pace was not so unprecedented that the jury might not fairly find that the defendant was bound to anticipate and look out for it, and that the chain of events was continuous up to the injury to plaintiff.

As to the plaintiff's alleged contributory negligence, a pedestrian is not necessarily negligent if he leaves the sidewalk and crosses the street at other than the regular crossings. In so doing he may encounter risks that he would not on the sidewalk; but, unless they are manifest, it is for the jury, not the court, to say that his act was negligent.

Judgment affirmed.

BRUNELLE v. LOWELL ELECTRIC LIGHT CO.

Massachusetts Supreme Judicial Court — June 23, 1905.

188 Mass. 493, 74 N. E. 676.

[redacted]

2. SAME — CONSTRUCTION QUESTION FOR COURT. — The construction of the above contract was for the court and it was error to submit to the jury the question whether the plaintiff had a right to assume that the defendant undertook under the contract the inspection of the premises.

3. SAME — VIOLATION OF CITY ORDINANCE — CONTRIBUTORY NEGLIGENCE. — Where a plaintiff violates a city ordinance by attaching an extension to the electric light wires in his building without the written permission of the inspector of wires, such violation is evidence of negligence on his part.

Exceptions by defendant from judgment in favor of plaintiff. *Sustained.*

John J. and *Wm. A. Hogan,* for plaintiff.

William H. Bent, for defendant.

Opinion by HAMMOND, J.:

In 1893 the plaintiff began the use of electricity for lighting his store upon the ground floor, and such use was continued until January 13, 1903, when it was stopped until May 13, 1903, when it was renewed under the contract of that date. In May, 1902, the plaintiff made an extension of his wiring into the cellar of his store. A wire was attached to the inside wiring belonging to the plaintiff, near a door leading into the cellar, and was extended, in the form of a flexible cord about fifteen feet long, into the cellar. At the end of the cord was a lamp consisting of a socket and bulb. When not in use, the cord was kept suspended over a hook. There was no fuse in any part of this extension, nor between it and the other wiring inside the plaintiff's store. There was a switch near the top of the cellar stairs, which could be turned so as to light the lamp, and in using the lamp it was customary to turn on the light by means of this switch, take the flexible cord down from the hook, and carry the lamp wherever needed in the cellar within the limit of the length of the cord. In making this extension the plaintiff did not ask leave of or notify the defendant. The inside wiring of the store, excepting fuses, was installed by the plaintiff, and all the wires, lamps, and other paraphernalia inside the store excepting the fuses, fuse box, and meter were his. It was in dispute whether the defendant knew of the cellar lamp. Under these circumstances the contract of May 13, 1903, was made. By its terms the defendant was to connect its electric system to the plaintiff's store, and furnish electric

current for eight incandescent lamps, each of 16 candle power, and was authorized by the plaintiff to set up in convenient and suitable places on the premises the necessary transformers, meters, and appliances; and it was further agreed that "no change or alteration" should "be made in the number of horse power of the motors, the number or candle power of the lamps, or the wiring of the * * * premises, without first obtaining the written consent of the" defendant. All lamps, meters, wires, and other appliances furnished by the company were to remain its property. It was further agreed "that all wires upon the premises of the customer to which the company's service will be connected shall be so installed that the company may carry out this contract, and shall be kept in proper condition by the customer." Then follows the provision that the "customer will give or obtain all necessary permission to enable the agents of the company to carry out this contract and to enter upon the premises at all reasonable times, so long as any of the company's property remains therein, for the purpose of keeping in repair or removing its property or inspecting its own or the customer's wires or apparatus." We are of opinion that under this contract the defendant did not owe to the plaintiff the duty of inspecting the wires and apparatus belonging to him. The duty of keeping such wires and apparatus in proper condition rested upon him by the express language of the contract, and by necessary implication there was imposed upon him the obligation to use due care in its performance. It is plain that such care would involve proper inspection. The right reserved to the defendant to inspect the property of the plaintiff was not inserted for his protection, but for that of the defendant. The provision gave to the defendant a right to be exercised in its own interest, and did not impose upon it a duty to be performed in the interest of the plaintiff. The fourteenth ruling requested by the defendant should therefore have been given. The question of the construction of the contract was for the court, and that portion of the charge which submitted to the jury the question whether the plaintiff had a right to assume that the defendant undertook under the contract the inspection of the premises, and which described the degree of care which would be required under that assumption, was erroneous in law, and was prejudicial to the defendant upon a material point in its case.

In view of the conclusion to which we have come upon this branch of the case, it becomes unnecessary to consider at length the questions arising upon the other grounds of defense, inasmuch as it cannot now be foreseen what shape they may take at another trial. It may be stated, however, that the extension made in May, 1902, was in plain violation of the ordinance, since it was made without the written permission of the inspector of wires. Section 9. The plaintiff thereby violated the ordinance within the meaning of section 14, which provides a penalty to be inflicted upon "whoever violates" any of its provisions. The case is clearly distinguishable from the class of cases of which *Perry v. Bangs*, 161 Mass. 35, 36 N. E. 683, upon which the plaintiff relies, is a type. It is further to be observed that, while the violation of law by a defendant, although evidence of his negligence, is not conclusive even when the illegal act contributes to the injury (*Hanlon v. South Boston Horse Railroad*, 129 Mass. 310, and cases there cited), yet such violation on the part of the plaintiff, which contributes directly and proximately to the injury received by him, is in general a bar to his recovery. "He is precluded from recovering upon the ground that the court will not lend its aid to one whose violation of law is the foundation of his claim." KNOWLTON, J., in *Newcomb v. Boston Protective Department*, 146 Mass. 596, 602, 16 N. E. 555, 4 Am. St. Rep. 354. See also cases cited in that case. Whether the plaintiff's violation of law contributed to the accident, and whether there is or could be anything in the knowledge of the defendant which would estop it from setting up that defense, it is not profitable now to consider.

Exceptions sustained.

LENT ET AL v. TILYOU.

New York Appellate Division, Second Department — June 23, 1905.

106 App. Div. 189, 94 N. Y. Supp. 479.

ELECTRIC LIGHT COMPANIES — RIGHT TO LAY CONDUITS IN STREETS. — The owner of a tract of land, who lays out walks through the same and leases portions of the tract abutting upon such walks to various individuals, is not obliged to allow electric lighting companies to lay conduits or other apparatus under the walks for the purpose of enabling such companies

to supply one of the lessees with electric lights, where it appears that the private walks were never dedicated or at least never accepted as public highways.

Appeal by the defendant from an order of the Supreme Court granting an injunction *pendente lite*. *Reversed.*

Before HIRSCHBERG, P. J., and BARTLETT, JENKS, RICH, and MILLER, JJ.

Thomas F. Magner, for appellant.

Charles A. Collin, for respondents.

Opinion by JENKS, J.:

The plaintiffs are an electric lighting corporation, and Lent is a would-be customer. In order to furnish light to Lent or any other customers who might apply, this corporation sought to lay down conduits, tubes, and other apparatus in certain ways known as the Bowery, Tilyou's Walk, and Kensington Walk. Lent is the lessee of the premises which abut upon the Bowery. It is practically undisputed that these three ways are walks made and maintained by the defendant, or by a company which he controls, over private property of which parts have been leased to various persons, as in Lent's case, for places of amusement, and of which a large part has been kept and maintained by the defendant and his said company for like purposes. The public has used these ways or walks for access to these various places of amusement. The Bowery has existed about thirteen years. The defendant as-

The learned and able counsel for the respondents concedes that the appellant is the owner of the legal and equitable title to all that part of the Bowery between the westerly terminus of the company's conduit and Lent's premises, and that the said Bowery and the said walks "have never been acquired by the city or dedicated so as to become streets in the legal sense;" but he asserts that Lent, with other occupants, "received their grants or leases, as the case might be, bounded by such streets, or with such streets in physical existence at the time." He asserts that the plaintiff corporation "bases its right to extend its conduits * * * solely by reason of its employment by the said plaintiff (respondent) Abraham Lent, and by other occupants of premises abutting upon the Bowery, Kensington Walk, and Tilyou's Walk."

It is contended that the reasoning in *Thousand Island Park Association v. Tucker,* 173 N. Y. 203, 209, 65 N. E. 975, 976, 60 L. R. A. 786, is applicable. In that case the plaintiff, a camp meeting or summer park association, had leased lots, and it was held that as against the plaintiff, the errand of Tucker, a farmer who supplied certain lessors of the lots with poultry and vegetables, was lawful; CULLEN, J., saying:

"But, however this may be, the lots leased were laid out on a map and plan of the park showing the streets and roads. By leasing the lots as designated on such maps, the plaintiff thereby dedicated the land in the streets and roads to the use of the lot lessees, and any one using a road for access to the premises of such lessee on the latter's request can justify his presence there as against the plaintiff under such dedication."

The cases may be discriminated. Tucker, incidentally to the errands of his business, merely used the road for access, as he had the right to do in common with the public. Naturally, he simply passed and repassed along it as his business required. The case at bar would be analogous if the plaintiff sought to use the way to carry lamps to Lent, or to deliver illuminating oil to them. But the plaintiff does not seek any such occasional use of the way in common with the public, but a permanent physical invasion thereof *pro tanto,* to the permanent physical exclusion of the defendant. The passing to and fro of Tucker was like unto the user of the public which was contemplated by the defendant in this case. But in permitting the public to use this way for access to the various places, the defendant did not thereby contemplate such use as the plaintiff would make of the land within the ways. In

Eels v. A. T. & T. Co., 5 Am. Electl. Cas. 92, 143 N. Y. 133, 139, 140, 38 N. E. 202, 204, 25 L. R. A. 640, the court, per PECKHAM, J., say:

"Still the primary law of the highway is motion, and, whatever vehicles are used, or whatever method of transmission of intelligence is adopted, the vehicle must move and the intelligence be transmitted by some moving body, which must pass along the highway either on or over, or perhaps under, it, but it cannot permanently appropriate any part of it."

And again, speaking of a highway:

"It is not a place which can be permanently and exclusively appropriated to the use of any person or corporation, no matter what the business or object of the latter might be. It was because the highway was permanently, and to some extent exclusively, appropriated by the elevated roads that it was held their erection, without the consent of the abutting owners, was illegal. *Story v. Railroad Co.*, 90 N. Y. 122, 43 Am. Rep. 146."

In *Bloomfield, etc., Gas-Light Co. v. Calkins*, 62 N. Y. 386, 389, 390, the court, speaking of the laying of gas pipes in a country highway, say:

"The use of the highway thus sought to be maintained is different, more injurious, and liable to produce far greater damage to the owner of the fee than mere passing or repassing; and the pecuniary loss occasioned by the exercise of such a power must necessarily be far more extensive and unlimited in its character. It would be beyond an ordinary trespass on the land or an appropriation of the surface of the soil. It would interfere materially with the freehold and enjoyment of the fee to an extent greatly exceeding anything which was ever contemplated or intended when the land was appropriated for the ordinary purposes of a highway. The right to the fee, to the fruits of the soil, and to carry water in pipes under the highway, which are laid down as expressly reserved (3 Kent, *supra*), would be taken away,

could not lay its pipes in a country highway without compensation to the owner of the abutting land, where its pipes were not used for lighting the highway through which the company sought to lay its pipes. *Calkins' Case* was approved in *Eels v. A. T. & T. Co., supra,* and in *Van Brunt v. Town of Flatbush,* 128 N. Y. 50, 55, 27 N. E. 973, 974. And the basic proposition for the judgment in *Palmer's Case* is that the owner of a fee in a country highway "taken and opened and dedicated" for the public use is entitled to no further compensation after the highway has become thickly settled and the highway has become a street, and hence the necessity for lighting the street has come, which requires the erection of poles and the stringing of wires, inasmuch as such lighting was a necessary street purpose, and so was not an additional burden without the implied contemplation of the parties at the time the land was "taken and dedicated to highway purposes." It is not contended that these walks were ever "taken and opened and dedicated" or "taken and dedicated" to highway purposes. Indeed, as I have pointed out, the learned counsel for the respondents states in his printed points that "the said Bowery and said walks have never been acquired by the city or dedicated so as to become streets in the legal sense." Whether there has been a dedication and an acceptance is a question of fact. *Flack v. Village of Green Island,* 122 N. Y. 107, 25 N. E. 267. I think that upon this record the intent of the defendant and those in common interest was merely to lay down these walks and to maintain them so that the pedestrial public might use them for access to the various places of amusement in this territory. And I think that no act of his or of those in common interest, or of their predecessors, has had the legal effect, in view of the other circumstances, to assure any other or greater rights in these ways to any person or corporation, public or private. It is well settled that "a private way opened by the owners of the land through which it passes for their own use does not become a public highway merely because the public are also permitted for many years to travel over it." *Speir v. Town of New Utrecht,* 121 N. Y. 420, 430, 24 N. E. 692, 964. And, even though a leasing of these lands under a description of these ways amounted to such a dedication, as was declared in the *Thousand Island Park Association Case, supra,* mere dedication, without acceptance, does

not constitute a public highway. *People v. Underhill,* 144 N. Y. 316, 324, 39 N. E. 333; *Palmer v. Palmer,* 150 N. Y. 139, 44 N. E. 966, 55 Am. St. Rep. 653; *City of Buffalo v. D., L. & W. R. R. Co.,* 68 App. Div. 488, 74 N. Y. Supp. 343. It has been held that there may be a partial or special dedication. Gerard on Titles to Real Estate (4th ed.) 750, citing cases. The opinion of GIBSON, C. J., in *Gowen v. Phil. Ex. Co.,* 5 Watts & S. 141, 40 Am. Dec. 489, is pertinent to the facts in this case. See, too, *Poole v. Huskinson,* 11 Mees. & W. 827. So far as any previous like occupancy of the walks is concerned, the owners were not absolutely estopped from a revocation. Gerard on Titles to Real Estate, 755, and authorities cited. There is no proof that for the full enjoyment of his property the lessee absolutely depends upon electric light to be furnished by this corporation, and therefore the question of the full contemplated enjoyment under the lease of the premises need not be considered. It seems a drastic proposition that a lessee of premises upon a way or road over private land, which may have been thrown open or even dedicated by the owners to the public for purposes of access, may, by a request upon a lighting corporation that it furnish him light for his premises, thereby secure for the corporation, against the will of the said owner, the right to enter upon and permanently occupy that way by its tubes and conduits to such extent as may be necessary to furnish electric light for such purposes. Practically there would be no limit to the network of conduits at the caprice of the tenant, or from the choices of the different tenants, or no limit to the disturbances of the street as tenants came and went. A judgment after trial may differ from the preliminary relief justified by this record. *Mills v. United States Printing Co.,* 99 App. Div. 605, 608, 91 N. Y. Supp. 185, and cases cited. But I am of opinion that this injunction *pendente lite* should not stand.

Order reversed, with $10 costs and disbursements, and motion for injunction, with costs. All concur.

AMERICAN COLORTYPE COMPANY v. JAMES REILLY'S SONS CO.

New York Supreme Court, Appellate Term — June 26, 1905.

47 Misc. 620, 94 N. Y. Supp. 493.

INSTALLATION OF ELECTRIC MOTOR — DAMAGES TO PRINTING PRESS. — Where after defendant had installed an electric motor, supplied by the plaintiff, and connected it with a certain press in plaintiff's printing room, defendant's electrician, who was not a professional pressman, started the press and when he saw everything running all right gradually increased the speed until something broke, the plaintiff was entitled to judgment for his press.

Appeal by the defendant from a judgment in favor of the plaintiff in the City Court of New York. *Affirmed.*

Before SCOTT, P. J., and DUGRO and MACLEAN, JJ.

H. Schieffelin Sayers, for appellant.

Walter D. Makepeace (*Roy C. Gasser,* of counsel), for respondent.

Opinion by MACLEAN, J.:

The defendant admits so much of the plaintiff's complaint as alleges that the defendant agreed to wire and install a motor and connect the same with a certain press in the printing room of the plaintiff. The plaintiff further alleges that the defendant so negligently turned on the electric power while the press, dynamo, and motor were in his hands, and at the time when none of the plaintiff's employees were present, and so negligently conducted the work of installation, that it was damaged. The trial justice found the facts to be as alleged by the plaintiff, and accordingly rendered judgment in its favor, and was justified in so doing, for the electrician employed by the defendant, and called as witnesses by the plaintiff, testified that:

"The plaintiff had supplied a new motor, and I had to wire it. * * * I connected the new motor to the press by a belt — the same belt that was there before. I started the press. * * * I then started it at the first speed; that is, the slowest. After I started it at slow speed, I looked over everything to see if it was running, while it was running. * * * When I saw everything running all right, I speeded it up to the next speed. Then I gradually increased the speed notch by notch, to see. That is what I did. I increased the speed until something broke in the press. * * * It was running at full speed. After the break occurred I left the building. I looked at the press and saw it was damaged. * * * I am not a professior pressman."

That he testified for the defendant that his attention was not called to the fact that the pulley on the new motor was a different sized pulley from that on the old motor would seem of no importance, notwithstanding another of defendant's witnesses testified, when asked if he could tell with reasonable certainty what might have caused this break, "The only thing that I can see or know of would be the increased size of the pulley, which increased the run of the press," for, when the defendant had installed the new motor, and made the connections so that it would actuate the press, and his electrician had started it up, and "saw everything running all right," he had certainly done all that he agreed to do, and, not having furnished the new motor, was not called upon to test it, unless requested so to do — particularly by one a self-confessed nonprofessional pressman.

The judgment should be affirmed.

DURGO, J., concurs.

SCOTT, P. J. (dissenting): I am unable to find in the case any evidence that the damage to the press was caused by an act of negligence on the part of defendant's employee. It seems to have been assumed by the learned court that the act of running the motor at full speed was the sole cause of the wrecking of the press. All that is shown by the evidence was that the break was coincident with the increase of speed, and there is nothing to exclude the possibility that there was some defect in the press itself which led to the injury. The plaintiff's contention appears to be that the mere fact of running the motor at speed was negligent. Of this there is no proof. The plaintiffs themselves furnished both the press and the motor. All the defendant was employed to do was to make the connection. It was proper that defendant should test the connection in order to see that it worked properly. If the motor was too strong for the press, or if there was danger in running it at speed, the plaintiffs should either have warned defendant's servant of the danger, or should have left an expert pressman to superintend and oversee the testing of the connection. It did neither. It had no right to assume that defendant's employee would know that it was safe to run the motor at half or three-quarter speed, and dangerous to run it at full speed.

Judgment should be reversed and new trial ordered, with costs to appellant to abide the event.

TERRACE WATER CO. v. SAN ANTONIO LIGHT & POWER CO. ET AL.

California Court of Appeal, Second District — Aug. 30, 1905.

1 Cal. App. 511, 82 Pac. 562.

1. ELECTRICITY PERSONAL PROPERTY — BREACH OF CONTRACT TO DELIVER. — Electricity is personal property and a recovery may be had for breach of a contract to deliver certain electric power.
2. SAME — DAMAGES. — In an action for a breach of contract to sell and deliver electric power the minimum of damages must of necessity be the procurement from another of that which the defaulting party failed to deliver.
3. SAME — ESTOPPEL. — Where the vendor of electric power voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it, he is estopped from denying that the injured party has not been damaged to the extent of his actual loss, and his outlay fairly incurred.

Appeal by defendant from judgment in favor of plaintiff. *Affirmed.*

Otis, Gregg & Surr, for appellants.

E. R. Annable and *H. M. Willis,* for respondent.

Opinion by ALLEN, J.:

This action is based upon an alleged breach of contract entered into between plaintiff and defendants, in which findings and judgment went for plaintiff. This appeal is by defendants from the judgment, supported by a bill of exceptions.

The defendant corporation on March 19, 1898, entered into an agreement in writing by which it obligated itself to furnish and deliver to plaintiff for the period of five years, during the irrigating season of each year and at a point to be designated by the plaintiff, on lots 7, 8, and 9, block 25, Rancho San Bernardino, a continuous service of twenty-four hours of electric power, in an amount not less than ten nor greater than twenty-horse power, for the sum of $6.50 per horse power per month; it being agreed that plaintiff should have a reasonable time in which to purchase and place in working order necessary machinery to utilize the power for the pumping of water from its wells situate on the lots before mentioned before the contract should become operative for the first year. The defendant corporation commenced the performance of such agreement, but in December, 1900, destroyed the

connections between its plant and plaintiff's pumping machinery, and thereafter refused to furnish any power whatever, and did not furnish power during the irrigating seasons of 1901 and 1902, but refused so to do. The court found that the plaintiff was required to, and did, for the ten and a half months comprising the irrigating season of the two years mentioned, purchase of the only parties from whom such power was obtainable, and at the cheapest rate, power with which to operate its pumps, at a monthly cost of eighty-six dollars in excess of the cost to plaintiff under said contract with defendant, the aggregate of which excess was $903, for which judgment was rendered.

Upon the trial the court below, under a general averment of damages, admitted evidence, against the objections of defendant, tending to show that seventy inches of water was necessary to irrigate the lands described in the complaint and upon which was situate the pumping plant. This proof of such use of water, its extent, and necessity, was not essential in establishing plaintiff's rights under the contract, nor, perhaps, under the allegations of the complaint, admissible. But it is apparent from the findings that nothing was considered, and nothing entered into the judgment, by way of special damages, and the error was not, therefore, prejudicial.

The court further admitted evidence tending to show that plaintiff, after the breach, in order to obtain the power agreed to be furnished to it by defendant, entered into an agreement in writing with another power company, from which it obtained the power for the delivery of which defendant was in default; and the full execution thereof and the payment for such power was established. For the excess cost over that which would have resulted to plaintiff, had defendant performed its contract, and for this excess cost and nothing else, the court rendered judgment. Appellant insists that such evidence was inadmissible under the general *ad damnum* clause of the complaint. The contract set out in the complaint was in reference to the sale and delivery of personal property. The thing of which there may be ownership is called property under our code. Civ. Code, § 654. There may be ownership of all inanimate things which are capable of appropriation or of manual delivery. Civ. Code, § 655. Every kind of property that is not real is personal. Civ. Code, § 663.

It may be regarded as a solecism to say that one may own a thing not susceptible of definition and the nature and character of which is practically unknown, yet when one gathers from the elements an energy or force which he may store, transmit, and utilize, he thereby appropriates to his own use that thing, whatever it may be, and it is a subject of ownership, of barter and sale, so long as it is in possession. The defendant by the contract agreed to sell the energy in which it had an ownership, and to deliver the same at stated times in fixed amounts; and, as appears from the contract, the price thereof had not been fully paid in advance. Section 3308, Civ. Code, provides: "The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has not been fully paid in advance, is deemed to be the excess, if any, of the value of the property to the buyer over the amount which would have been due to the seller under the contract, if it had been fulfilled." "Damages which necessarily result from the act complained of are denominated 'general damages,' and may be proved under the *ad damnum* clause. * * * The defendant must be presumed to be aware of the damages which necessarily result from the act done, and cannot be held to be taken by surprise." *Treadwell v. Whittier,* 80 Cal. 579, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. "Special damages must be alleged solely for the purpose of giving defendant notice of plaintiff's claim." *Bristol Mfg. Co. v. Gridley,* 28 Conn. 201. The parties to a contract of the character set out in the complaint must be held to have had in view the damages provided by law for its violation, and the minimum of damages must of necessity be the procurement from another of that which the defaulting party failed to deliver. To so act is, by our Supreme Court, in *Mabb v. Stewart,* 81 Pac. 1073, held to be a duty as an observance of the principle that one injured must exercise reasonable care to render the injury as light as possible. In this case the injured party did not permit special damages to the groves and land for the irrigation of which the contract was obviously made, but did that which produced the least injury. It certainly cannot be said that one violating a contract cannot be supposed to contemplate as a result, and one which would necessarily follow its violation, that which would produce the least possible injury. Notice is not essential when only such claim is sought

to be established. The party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it, is estopped from denying that the injured party has not been damaged to the extent of his actual loss, and his outlay fairly incurred. *U. S. v. Behan,* 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168.

The proposition advanced, that a party may disregard his obligations and confidently assume that the only consequence thereof is a nominal damage, and that such nominal damage is all that necessarily follows such violation, and all that can reasonably be anticipated as a penalty, should have no support.

We find no error in the record, and the judgment is affirmed.

We concur: GRAY, P. J.; SMITH, J.

MAHAN v. NEWTON & B. ST. RY. CO.

Massachusetts Supreme Judicial Court — Sept. 7, 1905.

4 St. Ry. Rep. 413, 189 Mass. 1, 75 N. E. 59.

ELECTRICITY — INJURY TO EMPLOYEE OF ELECTRIC LIGHT COMPANY FOR FAILURE OF TROLLEY COMPANY TO PREVENT TROLLEY WIRE FROM COMING IN CONTACT WITH LIGHT WIRE — VIOLATION OF RULES OF LIGHT COMPANY AS CONTRIBUTORY NEGLIGENCE — USE OF "GUARD WIRES" TO PREVENT CONTACT WITH OTHER WIRES. — 1. Where the employee of an electric light company was killed by electric shock by reason of the electric light wire upon which he was at work coming in contact with a trolley wire, alleged to have been due to a failure of the trolley company to use an appliance known as a "guard wire," in common use for the purpose of preventing contact between trolley wires and other wires, evidence examined and held: (1) That it could not be said as matter of law that the defendant was not guilty of negligence; (2) that the question whether the intestate was in the employ of due care was one for the jury.

2. Where there was a rule of the electric light company that linemen should treat every wire as a live wire, it could not be said that in no

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Injury to Employees of One Company by Contact with Electric Wires of Another. — See note to *Economy Light & Power Co. v. Sheridan,* 8 Am. Electl. Cas. 795. As to injury to cable splicer by shock from guy wire charged from an electric wire, see *Law v. Central District Printing & Telegraph Co., post,* 140 Fed. 558. As to injury to electric light trimmer by contact of trolley wire with electric light wire, see *Garretson v. Tacoma Railway and Power Company,* 50 Wash. 24, 96 Pac. 512. As to death from contact with span wire dangerously charged from an electric light wire, see *Cutler v. Putnam Light & Power Company,* 80 Conn. 470, 68 Atl. 1006.

case and under no circumstance would linemen be justified in treating a wire as a dead wire because of the rule, as the rule was, at most, only one circumstance to be considered with others.

3. Questions with reference to the customary use of guard wires for the purpose of preventing contact between the trolley wires and other wires held clearly admissible in an action due to an electric shock coming from a trolley wire in contact with a light wire.

Defendant excepts to verdict for plaintiff. Exception *overruled.*

Geo. L. Mayberry and *Vahey, Innes & Mansfield,* for plaintiff.

Walter I. Badger and *Wm. H. Hitchcock,* for defendant.

Opinion by MORTON, J.:

This is an action of tort by the plaintiff, as administrator of the estate of John P. Mahan, to recover for personal injuries to, and for the death of, his intestate, which are alleged to have been caused by the defendant's negligence while the intestate was in the exercise of due care. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the court to rule, as requested by it, that the plaintiff was not entitled to recover, and to direct a verdict for the defendant and to the admission of evidence.

The accident occurred November 4, 1899. The plaintiff's intestate was at the time a lineman in the employ of the Newton & Waltham Gaslight Company, and was at work putting a cross-arm on to a pole belonging to that company in Beacon Square, Watertown. While so at work an electric current passed into and through his body, causing his death and the injuries complained of. The plaintiff contends that the current came from the contact of the trolley wire of the defendant company with an electric light wire belonging to the gaslight company, and that there were no guard wires above the trolley wire, as there should have been to prevent such an accident. We think that there was evidence supporting this contention.

There was testimony tending to show that, just below the place where the plaintiff's intestate was engaged in putting up the cross-arm, there were two other cross-arms carrying wires belonging to the gaslight company. The upper arm carried two wires belonging to the so-called commercial circuit, and the lower carried wires belonging to the incandescent circuit, which supplied the street lights of the town. There was testimony tending to show that,

when the plaintiff's intestate mounted the pole, there was no current passing over any of these wires. Plugs had been pulled out of a cutoff box near by, which had the effect, it was testified, of rendering the commercial wires dead wires from there to the end of the circuit, which distance included the pole on which plaintiff's intestate was working. The incandescent circuit had been shut off at the works at 12.30 A. M., and an arc circuit, which was the only other one operated by the gaslight company, had been shut off at the works at between 5 and 5.30 A. M. The cutoff box was examined half an hour after the accident, and was found with the plugs out and in good order. There was no dispute that the man was killed by the passage of an electric current through his body, and the testimony above referred to and other testimony tended to show that the current could not have come from the works of the gaslight company. The accident did not occur till a car of the defendant company approached the scene, and at the time of the accident there was testimony tending to show that the car was only a short distance away. There was also testimony tending to show that, as the car approached, the trolley pole lifted the trolley wire very near to the electric light wires, and "one witness testified that the trolley wire was shoved up against the electric light wires."

In view of this and other testimony, we do not see how it could be said or ruled that there was no evidence that the current which killed the plaintiff's intestate came from the trolley wire of the defendant. There was testimony to the effect that the cutoff box contained a fuse that would have burned out if at any time prior to the accident any heavy current had got into the wires connected with the box from an outside source, and that the fuse was in good condition after the accident. There was also testimony tending to show that a current of 500 volts, which was the current carried by the trolley wire, would not kill a man, or, at least, would not kill him unless he was well grounded, and that plaintiff's intestate was not well grounded. But these were matters for the jury to pass upon. It could not be ruled as matter of law that by reason of them the jury would not be warranted in finding that the current came from the trolley wire.

The fact, however, that the current came from the defendant's trolley wire, if it did so come, would not, of itself, without any-

thing more, render the defendant liable. It must further appear, or there must be evidence tending to show, that the plaintiff's intestate was killed as the result of a breach of some duty which the defendant owed to him. The negligence relied on is the failure of the defendant to put up and maintain guard wires. There was evidence, which was objected to by the defendant, tending to show that it was customary to use such wires, and that they were in general use at the time of the accident, and that they were used to prevent other wires from coming in contact with the trolley wire, which was an uncovered wire, and thus becoming charged. The witness who testified to this admitted on cross-examination that some systems did not use such wires, and that they were not used in many important localities in this vicinity. The defendant was operating cars in the public streets by the use of a highly dangerous agency. It was bound to know that other wires were or might be strung along the streets for various purposes, and that persons would or might be employed to work upon them, and it was its duty, in the exercise of reasonable care, to adopt such precautions as were proper to prevent its own wires from coming in contact with the wires upon which such persons were or might be employed and injuring them. It was for the jury to say, taking everything into account, including the expense and practicability of guard wires and the way in which the trolley wire was put up, as to which there was evidence from the defendant, whether the defendant had performed this duty, and whether the plaintiff's intestate was injured and killed in consequence of its failure to do so. It could not be ruled as matter of law that there was no evidence of negligence on its part, or that the negligence, if any, had not resulted in harm to the plaintiff's intestate. *McKay v. So. Bell Tel. Co.*, 6 Am. Electl. Cas. 223, 111 Ala. 337, 19 South. 695, 31 L. R. A. 589, 56 Am. St. Rep. 59; *City Electric Ry. Co. v. Conery*, 6 Am. Electl. Cas. 217, 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262; *Atlanta Consol. St. Ry. Co. v. Owings*, 6 Am. Electl. Cas. 271, 97 Ga. 663, 25 S. E. 377, 33 L. R. A. 798; *Potts v. Shreveport Belt Ry. Co.*, 110 La. 1, 34 South. 103, 98 Am. St. Rep. 452; *Brooks v. Consol. Gas. Co.* (N. Y. Err. & App.), 57 Atl. 396; *N. Y. Tel. Co. v. Bennett*, 7 Am. Electl. Cas. 543, 62 N. J. Law, 742, 42 Atl. 759; *United Elect. Ry. Co. v. Shelton*, 89 Tenn. 423, 14 S. W. 863;

Block v. Railway Co., 5 Am. Electl. Cas. 293, 89 Wis. 371, 61 N. W. 1101, 27 L. R. A. 365, 46 Am. St. Rep. 849.

The defendant further contends that the plaintiff's intestate was not in the exercise of due care He was not a regular lineman. He had been working for the gaslight company two weeks when killed, and a year and a half before had worked for it about six weeks. So far as appears, this had been the extent of his experience in the electric light business. The superintendent of the gaslight company testified that the linemen were to look out for their own safety, and that a notice to that effect was posted at the works, and the men were also instructed by the foreman. He also testified that there was a rule that the linemen should treat every wire as a live wire, and that the company provided rubber gloves for men to use in handling dangerous wires. But there was evidence tending to show that the deceased had no reason to believe, when he mounted the pole, that any of the gaslight company's wires which it carried were then dangerous; and, if they were not, there was no occasion for him to use rubber gloves, even if such gloves had been provided by the company and were there for use, of which latter fact there was slight, if any, evidence. The rule that linemen should treat every wire as a live wire was made in their interest and for their safety, as well as in the interest of the company, and was intended as a general standard of conduct for the men in working about the wires of the company. It would be going too far to say that in no case and under no circumstances would a lineman be justified in treating a wire as a dead wire because of the rule. That would be making the rule itself a conclusive standard of negligence, whereas it was, at most, only one circumstance to be considered with others. The relative position of the trolley wire and the electric light wires was open to view. But there was nothing to show that the intestate's attention was called to it, or that, if it had been, he would have appreciated the danger from a contact of the two wires; and he could hardly be deemed at fault for not observing the relative position of the two wires, when the superintendent of the electric light company, whose business it was to notice such matters, testified that he might have driven through the square without seeing it. The question whether the intestate was in the exercise of due care was eminently one for the jury.

There remain two questions of evidence — one, already referred to, of the customary use of guard wires; and the other, that in this part of the country, according to the usual construction, a trolley wire would be lifted between three and four inches by the passage of a car along the track. We construe the evidence relating to the former as meaning simply that there was an appliance, known as a "guard wire," in common use for the purpose of preventing contact between trolley wires and other wires. So construed, the evidence was clearly admissible. *Dolan v. Booth Cotton Mills,* 185 Mass. 576, 579, 70 N. E. 1025, and cases cited. In regard to the other matter we think that the evidence was admissible, as tending to support the plaintiff's contention that the accident was caused by a contact between the trolley wire and the electric light wires.

Exceptions were taken to the admission of other evidence; but they have not been argued, and we treat them as waived.

Exceptions overruled.

LAW v. CENTRAL DIST. PRINTING & TELEGRAPH CO.

Circuit Court, W. D. Pennsylvania — Sept. 8, 1905.

140 Fed. 558.

1. INJURY TO CABLE SPLICER BY SHOCK FROM GUY WIRE CHARGED FROM ELECTRIC LIGHT WIRE — NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE. — In an action by a cable splicer to recover for injuries sustained by shock from a guy wire charged from an electric light wire, it appeared that the plaintiff, an experienced man, climbed a pole which stood between two lines of electric light wires, to repair the cable. One of the electric light wires, which had been fastened away from the telephone pole by a bracket, had become loose and fallen from the bracket across the guy wire. It was also shown that the fallen electric light wire could not be seen from the ground, and that the placing of the telephone pole between the electric light wires was a proper construction. Evidence examined and *held* that defendant was not negligent and that plaintiff was guilty of contributory negligence in failing to see the dangerous condition after he had climbed the pole.

2. LIABILITY OF GUY WIRES TO BECOME CHARGED — NOTICE. — The liability of guy wires to become charged by contact with other wires is of such frequent occurrence that even the courts have taken notice of it, and must therefore be assumed to be known to an employee of practical experience.

Guy Wires Charged with Electricity. — See *San Marcos Electric L. & P. Co. v. Compton, post,* and note.

At law. On rule for judgment *non obstante veredicto* on reserved points.

W. S. Dalzell, for the rule.

J. W. Kinnear, opposed.

Opinion by ARCHBALD, District Judge.

The jury by their verdict found the defendant company guilty of negligence, and absolved the plaintiff from blame; but the question is whether this was justified by the evidence, which is now to be determined on the points of law reserved. There is no controversy over the material facts. On the occasion of the accident the plaintiff was in the employ of the defendant as a cable splicer, having been advanced to that position by reason of his previous good record as a lineman, at which work he had been engaged for three or four years. In that capacity he was required to climb the poles of his own and other companies, moving among and about the various electric wires and appliances upon them, and making repairs to the telephone cables wherever they were found necessary. On the day in question he was ordered by the defendant company's testman to go down along Iron street, in the city of Johnstown, Pa., where he was then stationed, and fix up a cable somewhere out in that direction which was supposed to need mending by having been mashed against an electric light pole. There was nothing more specific than this in the order, and, being familiar with the lines of poles and wires in that locality, he was supposed to himself discover the injury and fix it. Taking along his brother as helper, he proceeded in the direction indicated, making observations as he went, in order to do so. It was about 11 o'clock in the morning of a bright day in August, and, as he came to the pole where the accident occurred, he said to his brother that this seemed to be the place and he would go up and see. The trouble was not just there, but at a pole of the Johnstown Electric Light Company, about thirty-five feet distant, against which the cable had jammed and worn; and it was the plaintiff's purpose to climb the telephone pole and work his way from there out along the cable to where it was injured. The pole, where he was, was intermediate between the poles of the light company, which had two lines of wire extending *along* Iron street, one on each side of the telephone pole which

stood in between them. The street curved at that point, and to keep the outer electric wire off of the telephone pole a bracket with a glass insulator had been fastened to the latter and the electric light wire attached to it. And to meet the strain caused by the bend in the telephone line, conforming to the curve of the street, a guy wire had been tied around the pole and stretched to a stub about 250 feet distant. Without observing that there was anything wrong with any of the wires, excepting the cable that he was to fix, or that there was anything unusual or out of place, although he did notice that the bracket was vacant and that the light wire was down near the guy, the plaintiff climbed the pole, and with his eyes facing the sun reached out with one hand and grasped the cable, and with the other took hold of the guy wire, at once getting a severe shock, which drew him together for a second, and then, his weight breaking his hold, he dropped to the ground, receiving the injuries from which he has since suffered. The fact was, although it had escaped his notice, that the outer electric light wire had not only got loose and fallen from its fastening on the bracket, but was in contact with the guy wire, and was also, by the bend in the line, drawn close against the pole, into which it had burned a crease some five inches long and about an inch deep. The guy wire, although ordinarily carrying no current and entirely harmless, was thus highly charged and dangerous by reason of its contact with the light wire, from which the insulation was also off; and it was in this way that the plaintiff got his shock.

That the situation presented a peril, except as care was exercised to observe and avoid it, may be conceded; but the defendant company was not an insurer, and that of itself does not make out a case. It must still be shown that the dangerous condition resulted from the neglect of some duty charged on the defendant by its relation to the plaintiff, or there can be no recovery. The case is clearly to be distinguished, by reason of this relation, from *Dwyer v. Buffalo Electric Co.*, 7 Am. Electl. Cas. 456, 20 App. Div. 124, 46 N. Y. Supp. 874, which is relied on by plaintiff's counsel, where the defendant was held liable for a shock received by a lineman in taking hold of an iron bracket supporting a cross-arm, which was in contact with one of the defendant's electric light wires negligently strung too near it. The lineman in

that case was not in the employ of the electric light company, but of a telegraph company whose pole he had climbed in the course of his work; and the duty and degree of care which was due him was thus that which was due to the general public, and it is with reference to this that the observations of the court were made. But neither, on the other hand, am I prepared to hold, as in *Chisholm v. New England Tel. Co.*, 176 Mass. 125, 57 N. E. 383, that the danger encountered by the plaintiff here was one of the risks assumed by him in accepting employment. In that case a lineman, while engaged in stringing a telephone cable, accidentally hit his feet against a highly charged wire of another company at a point where the insulation was worn off by rubbing against a tree, and was killed, and it was held that there could be no recovery for his death from the company with whom he was employed; it being declared that the danger from an imperfectly insulated wire was one of the most characteristic risks a lineman has to encounter. Without undertaking to dispose of the case in hand upon any such ground, and treating it as one falling within the ordinary rule that the employer is bound to exercise reasonable care to guard the places, where his employees are to work, against unnecessary danger, the question is whether or not that duty was complied with here.

In discussing this, there are some things which clearly may be eliminated. It cannot be said, for instance, that the plaintiff was sent without warning to a place of known danger. The fact is that he was given no specific instructions, except to go out in

tact with the guy wire; and, if that be so, it is difficult to understand how the company could be expected to discover it, except by a character of examination which it is not the custom, nor is it practicable, to make. Ordinary care is all that is called for, and that is largely measured by what has been found necessary by the experience of the business; and it is undisputed that inspectors make their observations from the ground, and are not supposed to climb the poles unless there is something particular and special calling for it. The fact is that to charge the defendant company with failure to discover and remedy the crossing of these wires is to demand of it a higher degree of circumspection than the plaintiff himself is willing to be held to. *Flood v. Western Union Telegraph Co.*, 4 Am. Electl. Cas. 402, 131 N. Y. 603, 30 N. E. 196. For, in order to escape the charge of heedlessly running into manifest danger, he is compelled to maintain that, even after he had climbed the pole and was actually within reaching distance of the place, he was not able to discern and avoid the peril; and yet he expects that the defendant, with no better opportunity, nor, in fact, so good, should have known all about it in advance of his going there and have made the place safe.

This also disposes of the question whether the defendant is chargeable with notice, and so with negligence, by reason of the time which must have elapsed since the electric light wire had fallen from the bracket. The evidence is that the insulation was off at the point of contact, and that the pole had been burned into to the depth of an inch and the length of five inches. It was also testified that no rain had fallen in that locality for at least six days, and that, while the pole might have been burned in the way described in a single night if it had rained, it could not have been, during the period mentioned, if it were dry; from which it is argued that the situation had existed as it stood for upwards of that time. But time, under the circumstances, does not enter into the problem. It figures only where the difficulty is such that it might have been discovered, and so should have been, by the exercise of reasonable care and diligence. Where, as here, the situation was one which ordinary observation would not disclose, as the plaintiff's own testimony establishes, the time for which it had existed is clearly immaterial.

The plaintiff's case is therefore brought to the final position

that the falling of the electric light wire, by which the danger was created, was the result either of an originally negligent construction or a subsequent negligent maintenance, for either of which, as it is contended, the defendant was liable. In two respects it is claimed that the telephone line was not what it should have been at the point of the accident. In the first place it is said that the telephone pole never should have been set up between the electric light wires, but on the outside of them, by which they would both have swung clear of it, and in the next place, if this precaution was not observed, that the light wire which made the trouble should have been fastened to a cross-arm, and not a bracket. By the former arrangement, as it is contended, there would have been no possible contact with the telephone lines or equipment which would have been entirely to one side of the light wire; and by the other, if the electric light wire became unfastened and fell, it would be caught by the end of the cross-arm and so not get down onto the guy wire, as it did. As held at the trial, it is unimportant whether the telephone or the electric light company was originally responsible for the interlocking of these lines; that is to say, whether the telephone company came along after the electric light wires were up and set up its poles between them, warding off the one by fastening it upon a bracket, or the electric light company, which was first upon the ground, in reconstructing its lines strung the wires as they were found and nailed up the bracket. By whichever this was done at the outstart, as a matter of subsequent maintenance, both were responsible for its continuance, and, if that was negligent, either may be held.

The opinion was expressed by a number of witnesses that a cross-arm was safer than a bracket, and that it was the only proper construction to be employed in such a situation. The prominent idea in the minds of the most of those, however, seemed to be that by this means linemen and others who were called upon to work among the wires would have more room to get about in and less likely to come in contact with them — so far as this case is concerned, an entirely irrelevant matter. But the further reason was also given that, if the electric light wire got untied when fastened to a cross-arm, it would lodge between the pin and the end of the arm, instead of falling down upon the guy

wire; and this has therefore to be considered. Some of the witnesses, indeed, admit that even so it might sway in the wind and swing off, and that it would then fall to where the guy wire was tied around the pole, the same as from the brackets; a possibility which would not seem to make the one device, in this respect, much better than the other.

But, passing this by, as well as the counter-suggestion, that in falling from a cross-arm there would be a greater sag, which would make it obvious that something was out of order, all of these matters become irrelevant in the face of the real test, and that is whether the construction, which is complained of, was usual and ordinary. An employer is not called upon to exercise the highest, but only reasonable, care, nor to make use of the latest and most approved methods and appliances, but those which the custom of the business justifies. Whatever is lacking in these must be regarded as falling within the risks assumed by the workman in accepting employment. The rule, which is the same with regard to machinery as to places (*Patton v. Texas & Pacific Railroad,* 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361), is thus stated in 20 Am. & Enc. of Law (2d ed.) 76:

"It is not the duty of the master to furnish the best machinery and appliances obtainable. His duty is discharged when he furnishes machinery and appliances which are reasonably safe and suitable for the intended use and of the character ordinarily in use."

And, again (page 70):

"Where defective construction or maintenance of place of work is charged as the cause of the injury, the defendant may show that such place was constructed and maintained according to the methods in common use by other companies."

"The unbending test of negligence in methods, machinery, and appliances," says Mitchell, J., in *Titus v. Railroad,* 136 Pa. 618, 20 Atl. 517, 20 Am. St. Rep. 944, "is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and, however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way, for which liability shall be imposed." If this be so,

it is idle to contend that the use of a bracket, instead of a cross-arm, in the present case, was negligent. No fact is more completely proved than that this has been a common construction, where as here, an electric light wire is merely to be warded off or kept clear from an intervening pole, and that by the plaintiff's own witnesses. It may not at first seem so clear with regard to the setting of the telephone pole between the electric light wires. There was very little evidence directed to that subject. It was rather by argument that it was sought to be questioned. No one certainly undertakes to say that it was not an entirely safe and proper construction. But two witnesses were directly interrogated about it, and both answered somewhat ambiguously, suggesting a cross-arm as a relief from that, as well as the other, situation, and one at least stating that this would be the ordinary course to pursue. It is safe, therefore, to class this construction with the other, as among those in ordinary use; and, the defendants having thus in both employed nothing but what was common and usual in the business, there was nothing in either of which it could be convicted of negligence, and the plaintiff's action falls.

An adverse conclusion must also be reached on the question of the plaintiff's contributory negligence. Ordinarily, no doubt, this is for the jury, dependent, as it is, not only upon the facts, but the inferences to be drawn from them. *Coolbroth v. Pennsylvania Railroad,* 209 Pa. 433, 58 Atl. 808. But here the facts are undisputed, and there is but one conclusion to be deduced; for, disguise it as we may, the plaintiff is seeking to hold the defendant liable for that which was in reality the result of his own heedless and unthinking act. Aside from the inconsistency, already adverted to, of charging the defendant with negligence in not anticipating and providing against a situation into which he himself advanced in broad daylight, it is manifest, upon the most cursory consideration, that ordinary care was lacking in the course he took. It is undoubtedly to be taken as true that the contact of the electric light wire with the guy wire was not observable from the ground; nor that the insulation was gone, being either burned off or abraded; nor was there any particular warning, according to the evidence, in the circumstance that the bracket was vacant. But, whatever allowances is to be made for these things, they disappear after the plaintiff had climbed the

pole and had the situation immediately before him. Had he taken pains to look, he could not fail to have seen, what must have been within a foot of his eyes, that the electric light wire, which was plainly distinguishable by its size, was down against the pole, in contact with the guy wire, which it thereby of necessity charged with its high-tension current; and yet, notwithstanding this, he reached out and took hold of the guy wire to help himself up onto the cable, with the unfortunate result which followed. He might just as well have taken hold of the electric light wire itself, under the circumstances, and he is chargeable the same as though he had; the two being plainly in contact. It does not do to say that the sun was in his eyes. This was his own doing, and he had no business to go up into this network of wires hampered in any such way. What he could have seen with the exercise of suitable care, he was bound to see, and is responsible as a matter of law, even though he did not. Neither is it any extenuation to say that a guy wire is supposed to be harmless, carrying no current. The liability of guy wires to become charged in just this way by contact with others is of such frequent occurrence that even the courts have taken notice of it, and must therefore be assumed to be known to a person of the plaintiff's practical experience. Says Hall, J., in *Royal Electric Co. v. Heve,* Rapports Judiciares de Quebec, 11 Banc. Roi, 436:

> "The fact that guy wires become from accident live wires of the most dangerous character is one unfortunately of too frequent occurrence to be overlooked or ignored in the exercise of the constant supervision which an electric system exacts, and which the public have the right to enforce."

And this is quoted with approval by Brown, J., in *Alexander v. Nanticoke Light Co.,* 9 Am. Electl. Cas. 188, 209 Pa. 571, 58 Atl. 1068, 67 L. R. A. 475.

If, then, electric light companies, in their relation to the public, are to be held to the exercise of such care that this contingency shall not happen, surely those who are led by their duties up into the midst of intersecting lines and wires are called upon to recognize the same possibility and look out for it, under the penalty of being convicted of negligence if they do not.

Sufficient weight was not given by the jury to these considerations, or their conclusions must have been different, nor, for that matter, by the court, in submitting the case to them. Upon

review of it, however, at this time, I am constrained to hold that a verdict to the contrary cannot be sustained.

The rule to show cause is made absolute, and judgment is directed to be entered for the defendant *non obstante veredicto* on the points reserved.

O'LEARY v. GLENS FALLS GAS & ELECTRIC LIGHT CO.

New York Appellate Division, Third Department — Sept. 13, 1905.

107 App. Div. 505, 95 N. Y. Supp. 232.

DEATH FROM CONTACT WITH BROKEN ELECTRIC LIGHT WIRE IN STREET — CARE REQUIRED OF ELECTRIC LIGHT COMPANY — PRESUMPTION OF NEGLIGENCE. — In an action brought against an electric light company to recover damages resulting in the death of the plaintiff's intestate, it appeared that the intestate, a boy, was killed while playing in the street in consequence of an electric shock which he received from the end of a cut or broken electric wire which belonged to the defendant. The plaintiff gave evidence to the effect that the wire had been down from two to nine days prior to the accident. The defendant gave evidence to the effect that the wire had been inspected the Sunday preceding the Friday of the accident and offered proof to the effect that persons who were in the vicinity within a few days of the accident had failed to discover that the wire was down. It also appeared inferentially that the broken wire was no longer in use. There was no proof that the wire was not cut by the servant of the defendant.

The defendant had an appliance by which the existence of the broken wire could have been detected, and it gave no explanation of its failure to use such appliance since the inspection made upon the Sunday previous to the accident.

It was held that it was incumbent upon the defendant to exercise care proportionate to the danger resulting from the presence in the street of an electric light wire carrying a deadly current; that in the absence of any explanation of the defendant's failure for the five days preceding the accident to use the appliance by means of which the broken wire could have been detected, the jury were not justified in finding that the defendant had used the requisite degree of care; that the doctrine of *res ipsa loquitur* was applicable.

Appeal by the plaintiff from a judgment of the Supreme Court in favor of the defendant and from an order denying the plaintiff's motion for a new trial. *Reversed.*

Injury from Contact with Wires in Street. — See references and cases collated in note to *Spires v. M. & M. Elec. L., H. & P. Co., ante.*

The defendant is a corporation engaged in the business of generating and supplying gas and electricity for light and power purposes in the village of Glens Falls, and for that purpose has erected and maintains poles and wires on many of the public streets in said village. One of its pole lines extends up Walnut street, crossing Lawrence street at right angles. At the time of the accident to plaintiff's intestate a loop from the Walnut street line ran for some distance up Lawrence street. On the night of May 13, 1904, at about seven o'clock in the evening, the plaintiff's intestate, a boy of fifteen years of age, was playing with other boys, in the vicinity of the intersection of Walnut and Lawrence streets, a game called "Steps Taken." During the course of the game the plaintiff's intestate was being pursued by one of his playmates, and, running across the street, put out his hand to dodge around a tree which stood between the curb and the sidewalk. As he put out his hand it came in contact with the end of an electric light wire, which caused a flash of light and threw him upon the street and caused his death. It seems that this branch of the defendant's wire, which extended for some distance down Lawrence street, had prior to this time become separated, either cut or broken. The electric current in the wire came from the east. The part of the wire which was from the west was therefore a dead wire. That coming from the east carried a voltage of about 2,200 volts, and it was this current that caused the death of the plaintiff's intestate. This action was brought for damage for negligence causing the death. A trial was had before the court and jury, with a verdict of no cause of action. After the denial of the motion for a new trial, the plaintiff has here appealed from the judgment dismissing the complaint and from the order denying his motion for a new trial.

Before PARKER, P. J., and SMITH, CHASE, CHESTER, and HOUGHTON, JJ.

Timothy I. Dillon, for appellant.

J. A. Kellogg, for respondent.

Opinion by SMITH, J.:

The complaint in this action charges the defendant with negligence in permitting and allowing one of its wires, used for the purpose of conducting electricity, to become broken, and in allowing and permitting said wire to remain broken and out of repair, and to hang suspended downward toward the ground, so that said wire might come in contact with persons in or upon or using said street while the said wire was charged with electricity. The evidence of two witnesses for the plaintiff was to the effect that the wire had been down at least two days prior to the accident. Another witness swore that it was down four days, while still another witness swore that she saw the wire hanging upon the tree nine days before the accident. As against this the defend-

ant offered proof that the wire was newly put up a year before. The superintendent of the defendant inspected it the Sunday preceding the Friday of the accident, and other witnesses, who were in the vicinity within a few days of the accident, failed to discover that the wire was down. From the evidence it appears that the defendant had at its station a ground detector, from which it could be determined whether the wire had at any time broken down and become grounded. It appears that where the end of a broken wire hangs loosely over a tree, for instance, and does not come in contact in any way with the ground and thus make a ground circuit, this broken wire would not be shown by the test made by this ground detector. This superintendent swears, however, that there was another test — the "magneto pole;" "that is, in our company. That is a little appliance, with a couple of wires attached to it, to put in the circuit and ring it up. If it don't ring it is open. These are the devices used by electric light companies for the purpose of detecting wires that are broken; and, when we detect a wire that is broken, we look it up right away." If the end of this broken wire, then, touched a tree, so as to form a ground connection, the fact would be ascertained by the ground detector. An open wire, however, in which no ground connection was made, could only be ascertained by the use of this magneto pole. With this magneto pole at hand, the use of which would have discovered this break, there is not one word of evidence that that instrument was used at any time for such purpose. Assuming, for the argument, that the inspection made upon the Sunday previous to the accident was a thorough one, we are not satisfied with the verdict of a jury which holds the defendant to have been without fault in failing for five days to make tests by an instrument in their possession which would have discovered the break and the danger. With all safeguards an electric current of 2,200 volts along the streets of a city presents great danger. Care proportioned to that danger the law demands of defendant as reasonable and requisite. No reason is disclosed in the record for failing to ascertain by the magneto pole that the wire was broken. Without such explanation we are of opinion that the jury were not justified in finding that the defendant had used all precautions which the law requires to protect the public from harm.

The other branch of the case, however, to wit, the charge of negligence in suffering the wire to fall and present this dangerous situation, seems to have been overlooked by the learned trial judge. This wire extended along the public highway. It was charged with a dangerous and deadly current of electricity. That the breaking of a wire under such circumstances would constitute a *prima facie* case of negligence, so as to call upon the defendant to give full explanation, would seem to me undoubted. In fact, the learned counsel for the defendant in his brief admits this general doctrine as applicable to this case, but insists that the doctrine itself goes to the extent only of declaring that from the accident the jury may infer negligence, but are not bound so to do. Plaintiff's counsel, granting the right of the jury to disregard the *prima facie* case thus made, contends that he has not been given the benefit of the rule by the learned trial judge in his charge.

Examining the charge of the court, it was first charged that to establish his case the plaintiff must produce evidence which satisfied the jury that the defendant has done something, or omitted something which he ought otherwise to have done. The charge then proceeds:

"It won't do for you to guess, to say that the boy is killed and somebody ought to pay; but the plaintiff must produce evidence to you as sensible, practical men, which lodges in your mind and brings to it a reasonable satisfaction that he is right in the controversy. If the evidence is evenly balanced, or if you cannot find that the necessary fact exists, then the plaintiff cannot recover. * * * It don't rest upon the defendant to account for the accident, and it will not do to say that, because the boy was killed by the defendant's wire, that makes the defendant liable. This defendant had a perfect right to run through the streets of Glens Falls its wires, and to carry through them the current of electricity which it maintained through them; and if, after doing that as it did, it wouldn't be fair, if this line should break that day, perhaps a few hours before the accident, and then the boy was killed, to say that the defendant had been negligent. That wouldn't do, because it might be, and would be in such a case, one of these accidents which we all must stand when they come to us."

At the close of the charge the plaintiff excepted to that part of the charge in which it was said that it did not rest with the defendant to account for the accident, and also, if the wire break from any cause, it would not do to say that the was negligent, and asked the court to charge:

"That the fact that the electric wire fell, and that plaintiff was injured by coming in contact therewith, affords sufficient *prima facie* evidence that the accident arose from want of care on the part of the electric light company."

To this the court responded:

"That is so under ordinary circumstances. It appears here that the wire was hanging down before this accident; and both sides have attempted to explain the situation by evidence. Upon the whole evidence, as it now stands, it is a bare question of fact for the jury whether this was down on account of the negligence of the defendant, or whether it was down for such a length of time that it would have known or ought to have discovered it with a reasonably proper inspection."

To the refusal to charge the plaintiff excepted.

The exceptions noted are, we think, well taken. If the doctrine of "*res ipsa loquitur*" be here applicable, upon proof of the happening of the accident the negligence of the defendant was *prima facie* established, and it was for the defendant to account for the accident, or at least to give such explanation as was in its power of how the wire happened to be down. The qualification made by the court, to the effect that this was so "under ordinary circumstances," would seem to imply that the rule was not applicable to the case at bar. We think the request to charge was properly made and should have been granted without qualification.

The force of this exception, too, would seem to be emphasized by what seems to us an utter failure on the part of the defendant to explain this accident. It was stated upon the argument that this wire down Lawrence street was no longer in use. This does not directly appear in the record. It appears inferentially, however. The testimony of one of plaintiff's witnesses was that the wire had been severed for nine days. If the wire were in constant use, some proof could probably have been secured that the light which it fed had been burning during some of those nine days. Moreover, within three or four days after the happening of the accident a wire was put up there by the superintendent himself for the purpose of simply testing to see how near to the tree the wire came. If the wire had been in constant use, it would naturally have been replaced forthwith, and there would have been no need for this experiment. If the wire were not in use, it is not clear that the defendant was not guilty of negligence as matter of law in leaving a wire in a public street, charged with 2,200 volts of electricity, for which there was no use whatever, and

which wire might by some accident fall to the injury of passers-by. If the wire were not in use, it was not impossible that some lineman of the defendant may himself have cut it for some purpose. It is much more probable that, if this wire were cut, it was cut by some servant of the defendant than by some wrongdoer, who would have to climb twenty-five feet in the air to reach it. There is not one word of evidence, however, from the defendant, that the line was not cut by its servants. Without proof, then, that this line was not cut by some of the servants of the defendant, we think the defendant has failed to account for the accident, and failed to rebut the *prima facie* proof furnished by the happening of the accident itself.

It follows, therefore, that this judgment must be reversed, and a new trial ordered.

All concur; CHESTER and HOUGHTON, JJ., in result, on the ground that the verdict is against the weight of the evidence.

WARREN v. CITY ELECTRIC RAILWAY CO.

Michigan Supreme Court — Sept. 19, 1905.

4 St. Ry. Rep. 487, 141 Mich. 298, 104 N. W. 613.

1. ELECTRICITY — INJURY TO CHILD BY SHOCK FROM TELEPHONE WIRE CHARGED BY CONTACT WITH TROLLEY WIRE AS RESULT OF STORM. — Where plaintiff, a child of eleven, was injured by coming in contact with a live telephone wire, which lay upon the ground in a public street, and which received its dangerous current from a trolley span wire belonging to defendant, through its being pressed down upon the span wire by a limb of a tree, which was broken by a severe storm the previous evening, at a considerable distance from the point where the wire parted and fell, and where the evidence tended to prove insufficient insulation of the span wire, the questions of the defendant's negligence in not properly insulating such span wire and in not protecting it from the impact with other wires, and as to whether there had been reasonable and proper inspection, were for the jury.
2. SAME — PROXIMATE CAUSE. — In such case, if there was a want of insulation or failure to guard the span wire to an extent that a prudent man would do it, there was a failure of duty which might be a concurring cause of the accident, in which case it could not be said that the proximate cause was the breaking of the tree.
3. SAME — INSPECTION. — Reasonable and proper inspection held, in such case, to depend upon the condition of the line and the nature of the danger to be feared.

4. SAME — JUDICIAL NOTICE. — Electricity is a treacherous and destructive agent, of whose dangerous qualities the court may take judicial notice, as well as of the fact that society recognizes them and acts accordingly.
5. SAME — INSTRUCTIONS AS TO CARE REQUIRED. — In such case, a charge that the duty imposed upon the railway company in the use of electricity was such as ordinarily careful and prudent persons would exercise in dealing with electricity under similar circumstances, was sufficiently favorable to defendant.
6. SAME — EXPERT TESTIMONY AS TO SUFFICIENCY OF INSULATORS. — In such case, experienced persons held competent to testify as to the efficiency of a certain kind of insulators used to prevent hot span wires, as well as their tendency to fall into disuse in places where formerly used and also held that it was proper to introduce the insulator in evidence.

Defendant appeals from judgment in favor of plaintiff. *Affirmed.*

Phillips & Jenks, for appellant.

S. A. Graham and *George G. Moore,* for appellee.

Opinion by HOOKER, J.:

The plaintiff, a lad of eleven years of age, was seriously injured by coming in contact with a live telephone wire, which lay upon the ground in a public street in Port Huron. The proof shows that the telephone wire received its dangerous current from a trolley span wire belonging to appellant, through its being pressed down upon said span wire by the limb of a tree, which was broken by a severe storm the previous evening, at a considerable distance from the point where the wire parted and fell, which was the place where the boy was injured. Action was brought against the telephone company and the appellant, and a verdict and judgment of $9,000 was returned against the latter; a verdict being

the proof as to the former was improperly admitted, and that the inspection was conclusively shown to be reasonable. Whatever may be said of the former, we cannot say as a matter of law that the inspection proved was reasonable and proper. That is a question for the jury, depending as it does upon the condition of the line and the nature of the danger to be feared. The frequency and care required in inspections depend much upon the character of the apparatus, or machinery, or other agent from which danger is to be feared, and as its destructiveness and danger is increased the duty of care increases. In other words, the degree of hazard attending the use of a dangerous article has a direct relation to the care which is requisite in its use. Electricity is to be classed with gunpowder, dynamite, and other treacherous and destructive agents, of whose dangerous qualities we may take judicial notice, as well as of the fact that society recognizes them, and acts accordingly. No prudent man handles these things with a low degree of caution. We find it unnecessary to say, as some courts have said, that the use of electricity imposes the duty of the greatest possible care. The circuit judge did not so charge, but contented himself with saying that the duty requisite was such as ordinarily careful and prudent persons would exercise in dealing with electricity under similar circumstances. This was sufficiently favorable to the defendant, although it involved the idea, before expressed, that the nature of the hazard is an element in determining the question. The frequency and nature of the inspections required depend in a measure upon this. The following authorities, suggested by plaintiff's brief, show the trend of decisions upon this subject: *Friesenhan v. Telephone Co.*, 134 Mich, 292, 96 N. W. 501; *Wolpers v. N. Y. & Q. Elec. Co.* (Sup.), 86, N. Y. Supp. 845; *Paine v. Electric Co.* (Sup.), 7 Am. Electl. Cas. 651, 72 N. Y. Supp. 279; *Will v. Edison Co.* (Pa.), 7 Am. Electl. Cas. 642, 50 Atl. 161, 86 Am. St. Rep. 732; *Denver Con. Electric Co. v. Lawrence* (Colo. Sup.), 8 Am. Electl. Cas. 617, 73 Pac. 39; *Economy L. & P. Co. v. Hiller* (Ill.), 8 Am. Electl. Cas. 462, 68 N. E. 72; *Memphis St. Ry. v. Kartright* (Tenn.), 75 S. W. 719; *Lexington Ry. Co. v. Fain* (Ky.), 8 Am. Electl. Cas. 499, 71 S. W. 628; *Lutolf v. United Elec. Co.* (Mass.), 8 Am. Electl. Cas. 506, 67 N. E. 1026; *Richmond & P. Elec. Ry. Co. v. Rubin* (Va.), 9 Am. Electl. Cas. 138, 47 S. E. 834; Keasbey, Elec. Wires

§§ 242, 269; 3 Current Law, 1182; 1 Current Law, 996; *City Elec. Co. v. Conery,* 6 Am. Electl. Cas. 217, 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262; 3 Current Law, 1185.

Counsel contend that the evidence shows that a reasonable time for appellant to discover the danger and make repairs had not elapsed, and that the jury should have been so instructed. Were it conclusively shown that defendant's line was in such perfect condition that the live wire was only chargeable to the effect of an extraordinary storm, this point would merit more consideration. But there was a claim of negligence in not properly insulating the span wire, and in not protecting it from the impact of other wires, both of which questions were for the jury.

In this connection it is urged that the proximate cause of the injury was not the want of insulation, nor the failure to guard the span wire, but it was the breaking of the tree. It is generally the case that an accident is the result of concurring causes. If the rain and snow never fell and the wind never blew, wires would be less likely to fall and break. In this case the span wire was hot where it was not intended to be. The telephone wire was pressed upon it when it was not so intended. The wire burned in two from the intense heat taken on from the span wire, and the ends fell. All of these were things to be anticipated and guarded against. If this was not done to the extent that a prudent man would do it, there was a failure of duty, which might be a concurring cause of the accident, making defendant liable. Thus

upon the effectiveness of these insulators; also, that it was proper to introduce the insulator or hanger in evidence.

Walker, a foreman of defendant, was asked on cross-examination if it was not common knowledge and common talk among the defendant's employees that the span wires were charged. If this was not proper on cross-examination, the answer did not injure defendant; for our attention is not called to an admission that it was so. It was not improper to show on cross-examination that he may have warned linemen against hot span wires.

It is claimed that the damages were excessive. On motion for a new trial they were reduced to $6,000, in which plaintiff acquiesced. The injury was serious, and we think the judgment should not be reversed on this ground.

Complaint is made of the intemperate discussion of the case, but we are not satisfied that defendant was injured by what was said. We think it unnecessary to discuss other questions.

We have found no error, and the judgment is affirmed.

SEATTLE ELECTRIC CO. v. SNOQUALMIE FALLS POWER CO. ET AL.

Washington Supreme Court — Oct. 14, 1905.

40 Wash. 380, 82 Pac. 713.

CONTRACT TO SUPPLY ELECTRIC CURRENT FOR PUBLIC USE — SPECIFIC PERFORMANCE. — Where a contract by a power company to furnish electric current for running the street cars of a city and for maintaining its lighting system violated the franchise of the company, by stipulating that it would furnish electric current to no one else to be used in competition, it was held that such contract might be specifically enforced until the party operating the city railway and lighting system could secure power from other sources.

Appeal by defendants from a judgment for plaintiff. *Affirmed.*

Thomas B. Hardin, for appellants.

Piles, Donworth & Howe, for respondent.

Opinion PER CURIAM:

The appellant, Snoqualmie Falls Power Company, was incorporated in January, 1898, for the purposes of manufacturing and selling electricity to public and private consumers, for heat, light,

and power purposes. Its capital stock was fixed at $500,000, divided into 5,000 shares of the par value of $100 each, all of which with the exception of four were subscribed for, and have since been owned by one William T. Baker. In August, 1898, the city of Seattle granted a franchise to the said Baker, running for a period of thirty-six years, conferring upon him the right to erect poles upon the streets of that city, and string wires thereon, for the purpose of distributing therein electricity generated at the power plant of the Snoqualmie Falls Power Company. The franchise contained a number of restrictions intended for the benefit of the consumers of the product of the plant. It required the grantee to distribute the current manufactured by him at "his Snoqualmie Falls power house" to "all persons and corporations desiring the same" on equal terms and under reasonable regulations, and prohibited him from entering into any combination whatsoever, whereby the public or the city would be deprived of the benefits of competition in the purchase of electricity. Immediately on obtaining this franchise, Baker organized another corporation, called the "Seattle Cataract Company," and assigned to this company all the rights he had acquired by the grant to him of the above-mentioned franchise. The capital stock of this company was fixed at $100,000, divided into 1,000 shares of the par value of $100 each. Of these shares Baker has likewise owned the entire issue except a mere nominal number. In January, 1900, the respondent corporation was organized. At that time the street railways and the electric lighting systems of the

Company, by the terms of which the latter company agreed to sell to the former 3,000 continuous electrical horse power, to be delivered at such time or times and in such quantities as might be called for by the respondent for the sum of $54,000 per annum (being at the rate of $18 per horse power per annum), to be paid in monthly installments; agreeing further to allow the purchasing company a certain excess of power in case it might desire it, at the same rate per horse power per annum it paid for the $3,000. This additional power was afterwards fixed at 250 horse power per annum. The contract entered into between the parties contained numerous conditions, among which was a condition to the effect that no electric current should be sold in the city of Seattle by the Snoqualmie Falls Power Company to be used in any branch of business in which the respondent was engaged; a condition in direct violation of the ordinance under which electric current was permitted to be brought from the power plant of the Snoqualmie Falls Power Company into the city of Seattle. The parties continued to operate under the terms of this contract until the morning of May 24, 1903, when the Snoqualmie Falls Power Company, in violation of the terms of the contract, and without notice, cut the connection between its generator and the respondent's power plant; and, when inquiry was made as to cause, stated that it had decided not to continue any longer in the performance of the contract. Thereupon the respondent brought this action against it, and against the Seattle Cataract Company, to compel the performance of the contract. A temporary mandatory injunction was issued, compelling the appellant to furnish the power until a final hearing could be had on the question at issue between the parties, and on this hearing the injunction was continued in force until June 4, 1904; the court granting to the respondent that length of time in which to obtain power from other sources. The appeal is from the last-mentioned judgment.

In its complaint the respondent set out the contract above mentioned, and alleged a compliance therewith on its own part. It further alleged that it was a public service corporation, engaged in the business of operating street cars and electric light systems in the city of Seattle by electric power; that its own generating plants were not designed for, and were insufficient to furnish, the power necessary to operate its systems; and that unless the ap-

pellant Snoqualmie Falls Power Company should be compelled to continue in the performance of its contract, it would be unable to keep its system of railways and lights in operation, thereby causing great annoyance and injury to the public, and to those who were dependent upon it to furnish them with transportation and light; and that already great confusion had been caused by the cutting off of the power theretofore furnished it by the appellant last named. The prayer was for relief appropriate to the allegations of its complaint. The appellants answering denied that the respondent was without means of its own to generate sufficient power for its own use, and set out affirmatively the negotiations leading up to the formation of the several corporations, the execution of the contract, and averred that the contract was designed to create a monopoly, and was in direct violation of the franchise granted to Baker, in which the appellant corporations operated, and was therefore null and void, and such as a court of equity would not enforce. The reply was a denial of all of the affirmative allegations of the complaint going to show a participation by the respondent in any unlawful acts, or acts against public policy, or knowledge on its part of any violations of its franchise, or of public policy, by the appellants.

The evidence in the case is voluminous, and the arguments of counsel in this court, have taken a wide range; but it seems to us that the real question presented by the record is one not difficult of solution. It will be remembered that the trial court did not undertake in its judgment to compel a specific performance of the contract between the parties, but he held that the evidence justified the conclusion that the facilities under the command of the respondent were not then sufficient to enable it to generate sufficient electric current to enable it to operate in an efficient manner the public facilities it was required by its franchise to operate, and it required the appellants to continue to furnish the power the respondent had contracted with it to furnish, and had relied upon, only until such reasonable time as the respondent could supply itself from other sources. The only questions presented, therefore, are, did the court err in its finding that the respondent had not sufficient facilities under its own command to enable it to operate sufficiently the public conveniences operated by it? and, after finding that it did not, did it err in holding as a matter of

law that the appellants could be compelled to furnish the power they had contracted to furnish until the respondent could with reasonable diligence acquire such facilities? Both of these questions we think should be answered negatively. It must be borne in mind that the questions are not reviewed out of any regard for the appellants. Their confessed violation of their duties to the public cannot be overlooked when they seek redress in a court of equity. Moreover, we cannot but feel that their conduct in cutting off the current they had agreed to furnish found its inspiration in the fact that they had discovered a place where they could dispose of it on more profitable terms than the contract afforded them, rather than from any compunctions of conscience because of their past misconduct. But the respondent seems from the evidence not to have been entirely free from blame in its contract with the appellants, hence it is proper to inquire whether it could have performed the public duties required of it without the aid of the power furnished it by the appellants. The evidence reasonably justifies the conclusion that it could not. While it may have had sufficient facilities for generating power to have carried the load required of it even at its most extreme point, it is made clear that this is not sufficient to constitute a safe working basis. Machinery, no matter how perfectly made, will get out of repair, and it is found that to furnish power for continuous use there must be a reserve force equal to the largest single unit used in generating such power. This the respondent did not have, and its claim that power from the appellant's power plant was necessary to secure an uninterrupted service, seems to have been justified.

Conceding that the power was necessary, there can be no serious dispute over the question of law involved. While courts of equity will not enforce contracts entered into either in violation of positive law or a rule of public policy where the interests of the parties thereto are alone involved, yet when the public interests are involved, it will enforce such a contract as long as such public interest requires it. It would have been greater wrong than any to which the appellants confessed to have permitted them arbitrarily and without warning to stop from operation the street car and lighting systems of the city of Seattle, especially when the only justification offered for it is a former wilful violation of their

franchise privileges. Neither courts of law nor equity will lend countenance to a plea so utterly without justification.

The judgment appealed from is affirmed.

RYAN v. ST. LOUIS TRANSIT CO.

Missouri Supreme Court — Oct. 25, 1905.

4 St. Ry. Rep. 634, 190 Mo. 621, 89 S. W. 865.

1. ELECTRICITY — INJURY TO LICENSEE, A SERVANT OF ONE CONTRACTING TO DO WORK IN POWER HOUSE, CAUSED BY PIPE OR WRENCH COMING IN CONTACT WITH INSUFFICIENTLY INSULATED WIRE — CONTRIBUTORY NEGLIGENCE. — Plaintiff's husband was employed by a heating and ventilating company to assist in installing certain pipes, etc., in the power house of the defendant company, and was killed by an electric shock caused by contact between an electric wire and either the pipe upon which, or the wrench with which, he was working. The light was sufficient to enable plaintiff's intestate to do his work, but not sufficient to make an examination of the insulation of the electric wires. *Held*,

   (1) That the duty devolved upon the defendant of keeping the electric wires near which the deceased was required to work in the performance of his duty so insulated and protected as to be safe for the deceased to work in their vicinity.

   (2) That deceased had every reason to assume that the wires were safely insulated and that he could work about them without danger to himself.

   (3) That the defendant, in the exercise of ordinary care, was bound to anticipate that these workmen, while in the course of their employment, would come in contact with these wires; and that the want of proper insulation of these wires was the proximate cause of the injury.

   (4) That the plaintiff's intestate was not guilty of such contributory negligence as to bar a recovery under such conditions, and the presumption was that he was in the exercise of due care.

2. SAME — INSTRUCTIONS. — In such case, where the court charged the jury that the defendant was not required to use the most perfect form of insulation, and that if that which the defendant was using at the time was reasonably safe and proper, there could be no recovery; but if the insulation was in an imperfect and dangerous condition, and this condition was known to the defendant, or could have been known by reasonable care and inspection, or if the deceased received an electric shock by reason of such imperfect condition without any negligence on his part, then the plaintiff was entitled to recover, was a more favorable instruction to the defendant than it had a right to demand.

3. SAME. — Instruction as to contributory negligence examined and held to be a fair and correct enunciation of the doctrine of contributory negligence as applied to this case.

Appeal by defendant from judgment in favor of plaintiff. *Affirmed.*

Geo. W. Easley and *Boyle, Priest & Lehman,* for appellant.

John S. Leahy and *Block, Sullivan & Erd,* for respondent.

Opinion by GANTT, J.:

This action was commenced July 19, 1901, against the St. Louis Transit Company and the Cullen & Stock Heating & Ventilating Company, to recover damages for the death of the plaintiff's husband. An amended petition was filed on the 10th of December, 1901, omitting all reference to the Cullen & Stock Company, other than the plaintiff's husband was a pipefitter in the employ of the Cullen & Stock Heating and Ventilating Company, which was under contract with the appellant to erect and place in position in its power house on Tiffany avenue, between Vista and Park avenues, certain pipes for the conveyance of water through said building and to the engines and boilers therein. It is then alleged that on the 9th day of May, 1901, the plaintiff's husband, James P. Ryan, at the special instance and request, and with the knowledge and consent of the defendant transit company entered the said premises in order to perform the labor required of him in the construction and the erection of said pipes, that said Ryan was required to and did get upon a certain conduit, and while on said conduit, and while exercising the care and caution in and about his work which should have been exercised by a reasonably careful person, and while handling and adjusting one of said iron pipes entering into the construction in which he was then engaged, the said Ryan received through said pipe on which he was then working an electric shock, which then and there immediately caused his death. The petition further alleges that adjacent and in close proximity to said iron pipes then being erected by said James P. Ryan, were certain cables or wires used by appellant for the purpose of distributing and equalizing the electricity between the switching boards in said building, and as a part of its appliance in generating and distributing electricity for the purpose of propelling its street cars; that said cables or wires were highly charged with electricity and were known to be so highly charged by the appellant, and that the said wires or cables so charged were exceedingly dangerous to life and limb, and

were known to be thus dangerous by the defendant; that because of the dangerous character of said wires or cables when so charged with electricity, and for the purpose of rendering them less dangerous, said wires had been insulated, but plaintiff charges the fact to be that the insulation on said wires or cables was decayed, insufficient, and inadequate to prevent the communication of electricity, with which said wires or cables were charged, to other metallic substance coming in contact therewith; that the same were negligently and carelessly insulated in an improper manner, and had been permitted to become decayed, disintegrated, and incapable of preventing the communication of electricity in said wires and cables to other metallic substances with which they might come in contact; that said wires or cables were negligently and carelessly strung along the ceiling of the basement of said building, and immediately over the conduit aforesaid; that said wires or cables were supported or held to the ceiling of said basement at spaces aggregating five feet, and by reason of the weight of said cables and the use to which they were put, the said wires sagged so that they hung from said ceiling at a point immediately over said conduit at a distance of about two feet below the ceiling, instead of being securely and tautly held close to the ceiling. The insulation of said wires was composed of a material that being stretched, would disintegrate, crumble, and fall off, thereby destroying the protection which said insulation was intended to afford, whereby the wires proper were suffered to come in contact with other substances, or, because of the defectiveness and insufficiency of the insulation, the electricity contained therein could be and was communicated to other objects with which said wires or cables could be and were in contact, and the said wires had been for a long time maintained by the defendant in the condition and position aforesaid; that is, in a condition and position such as permitted the electricity to be easily communicated to other substances coming in contact therewith, and that the maintenance of said wires or cables in said condition and position was negligence. Plaintiff says that on said 11th day of May, 1901, by reason of the defective condition of said wires and cables aforesaid, the electricity contained therein was communicated to the pipe or piping then being erected, and in the erection of which the said James P. Ryan was then engaged, and that while he,

the said James P. Ryan, was erecting the said pipe or piping, and while he, the said James P. Ryan, was exercising due caution, the electricity communicated from said wires or cables to and through said pipe and piping was communicated to the body of the said James P. Ryan with such force and violence as to cause his immediate death as aforesaid. Plaintiff says that it was the duty of the defendant to provide the said James P. Ryan a safe place in which to perform his labor; that the said pipe or piping was erected by said James P. Ryan at the point indicated and immediately over the said conduit by the command and direction of the defendant; and that it was the duty of the defendant to keep the said location free of danger while he, the said James P. Ryan, was complying with the directions and commands of the defendant. But plaintiff says that the said place so furnished him to do the work aforesaid was not a safe place, but, on the contrary, and by reason of the facts aforesaid, the same was a highly dangerous place, and because of the danger of the electricity contained in said wires or cables and the probability of the same being communicated to the pipes and piping upon which he, the said James P. Ryan, was then working, because of the defective insulation resulting from the causes aforesaid, the defendant failed in its duty to keep and maintain the said location where the said James P. Ryan was then working free from danger, and that by reason of the failure of the defendant to furnish the deceased, James P. Ryan, a reasonably safe place in which to perform his labor, and its failure to keep the same free from danger, the said James P. Ryan was killed as aforesaid. The answer was a general denial, with a plea of the assumption of the risk by the deceased, and the deceased's contributory negligence in the handling of the tools and piping which he was engaged in installing. The reply was a general denial.

The facts developed on the trial were substantially as follows: Cullen & Stock Heating & Ventilating Company contracted with appellant, the St. Louis Transit Company, to furnish materials and labor and install an automatic oiling system in appellant's power house at Tiffany and Vista avenues, in St. Louis, upon plans and specifications prescribed by appellant, the St. Louis Transit Company. For this purpose it was necessary to install in the basement room in the power house certain pipes suspended a short distance *from the ceiling by hangers.*

The plaintiff's husband was a steamfitter by trade, and was employed by the said heating and ventilating company to assist in this work, and was engaged for about three weeks in working on the premises in this connection. He and his helper, one Madden, installed the pipes referred to, and had put in three, and were engaged in putting in the fourth, when the accident occurred which cost him his life. The pipes ran parallel with each other, and a few inches apart. Above them were suspended a number of insulated wire cables, in use by appellant to transmit dynamic electricity to its overhead trolley wires in the streets, for the propulsion of its cars. These cables were constantly and highly charged with the electric fluid. They were suspended from the ceiling by hangers which were eleven feet and some inches apart, and which, according to the expert testimony in the case, were not close enough together; and between the hangers the cables had sagged downward. The experts said that the insulation of these cables was what was called weatherproof insulation, and not a proper kind of insulation to use in such a place as this basement, because this character of insulation was susceptible to heat, and the degree of heat which constantly prevailed in the basement was likely to cause this kind of insulation to soften, and possibly to drip or run. In its normal condition, the insulation used could not be cracked, penetrated, or broken so as to expose the live wires beneath it, without the exercise of considerable force, but if exposed to high temperature and softened, it might then be penetrated, broken, or displaced, although subject to no great degree of force. It might become softened by heat so as to be dangerous to handle, without that fact being apparent to the observation other than by actually touching the insulation. Plaintiff's husband was killed while putting in the pipe, in proximity to these cables, by the creation of what the experts call a short circuit, caused by contract between the wires of one of the cables and either the pipe upon which, or the wrench with which, he was working. This, the experts said, could not have happened if the insulation had been in good condition, because these cables were entirely harmless unless some metallic substance was brought in actual contact with the wires themselves, which could not have happened without the exercise of considerable force if the insulation had been in good condition. All of the testimony showed

that with the insulation in normal condition, these cables could be handled with impunity. The only metallic substances, which Ryan was using or handling at the time were the pipes which he was installing, and the wrench which he and his helper were using to do the work. The evidence on the part of the plaintiff tends to show that one of these two came in contact with the wires beneath the insulation of the cable, and thus caused the short circuit which produced the flames and shock, and resulted in Ryan's death. It is conceded that the evidence does not disclose positively, which of the two made the contact. The parties were screwing the pipe into another by means of a wrench. Madden, the helper, who survived the accident, says his hand was between the wrench and the cable which was closest, and that, at the time of the catastrophe, they had ceased to pull on the wrench, and Ryan was looking at the coupling of the pipe, while he himself was simply holding the wrench in position, and exercising no more force than was necessary for that purpose. The experts were of the opinion that contact between the live wires and the wrench alone would not have produced the phenomena which happened, unless the wrench was at the time in contact with the pipe; while contact between the pipe and the wire alone would have produced a short circuit. The wrench, the pipe, and the cable were before the jury and the experts, from the condition of the two former, were of the opinion that the pipe and not the wrench, had made the contact. At the trial, the insulation upon a portion of the cable, then in normal condition of temperature and hardness was hammered with a wrench without an effect. A portion of both the cable and the pipe were burned up in the contact at the time of the accident. It was further shown that the insulation on the cables at this place was soft and sticky at the time, although there was nothing to show that deceased knew that fact, or indeed, that he knew of the danger to which such a situation gave rise. The light in this basement was sufficient to enable the men to do the work they had set about, but not sufficient for one to make an examination of the insulation of these cables. Plaintiff's husband and Madden, his helper, attempted to light candles and a torch to furnish them more light to aid them in their work, but a strong draught prevented their doing it. The experts testified that owing to the excessive heat

which constantly prevailed in this room, the proper kind of insulation to have used was either fireproof insulation, or fire and moistureproof insulation, each of which is impervious to the action of such heat as prevailed there. There was evidence also to the effect that the insulation might have been melted or softened by the excessive current of electricity passing through the cable as well as from the heat in the room. And that although the insulation had run and melted off, the outer covering of cloth would still remain, and that if the wire resting on the pipe had been perfectly insulated, the contact would not have occurred. The instructions given by the court will be noted and considered as far as necessary in the opinion of the court. The jury returned a verdict for the plaintiff for $4,666.66. In due time the defendant filed its motion for a new trial and in arrest of judgment which were duly considered and overruled and the defendant brings the case to this court by appeal.

1. The first, and we may say the main, contention for a reversal of the judgment, in that the Circuit Court should have sustained a demurrer to the evidence, and this is based upon the ground that the defendant could not have reasonably anticipated the occurrence of such an accident as the one which caused the death of plaintiff's husband. It is practically conceded by the learned counsel for the defendant that the plaintiff's evidence justified the jury in finding that some portion of the insulation had run and dripped from the cable in consequence of the heat or temperature in the basement of the power house, and that the plaintiff's husband in some manner, not clearly explained by the

with the wrench if the deceased had not had his hand on the pipe at the same instant he had it upon the wrench; and the doctrine is invoked that it is not negligence not to take precautionary measures to prevent an injury, which, if taken, would have prevented it, when the injury could not reasonably have been anticipated, nor would not, unless under exceptional circumstances, have happened. In determining the soundness of the proposition thus advanced by the appellant, it is essential to ascertain what duty the defendant owed to plaintiff's husband with reference to its live wires in the circumstances of this case. It is to be noted that there were no contractual relations between the deceased, husband of the plaintiff, and the defendant transit company, but it is undisputed that the deceased was upon the premises of the company with its knowledge and consent, and to do a work for which the company had contracted with the employer of the deceased. When the defendant company made its contract with the Cullen & Stock Heating & Ventilating Company to install the oil system in the defendant's power house upon plans and specifications prescribed by itself, it knew and was bound to anticipate the necessity under which the heating and ventilating company rested of sending its employees upon its premises for the purpose of installing the pipes upon which the deceased was working when he was killed; and hence the duty devolved upon the defendant of keeping the electrical wires near which the deceased was required to work in the performance of his duty in installing the oil pipes, so insulated and protected as to be safe for the deceased to work in their vicinity. This doctrine after a thorough consideration was announced in *Geismann v. Electric Company,* 8 Am. Electl. Cas. 569, 173 Mo. 654, 73 S. W. 654. In that case the wire that had caused the injury belonged to a lighting company, and was suspended at the place of the accident upon private premises, although the latter did not belong to the owners of the wires. The deceased in that case went upon the premises to remove a sign which apparently belonged to a tenant and in the course of his labors a wire with which the sign was suspended came in contact with a live wire which produced the shock which resulted in his death, and the conclusion was announced:

"That electricity is one of the most dangerous agencies ever discovered by human science, and, owing to that fact, it was the duty of the electric light

company to use every protection which was accessible to insulate its wires at the points where people have a right to go, and to use the utmost care to keep them so, and for personal injuries to a person in a place where he has a right to be, without negligence on his part contributing directly thereto, it is liable in damages."

The rule thus announced in the *Geismann Case* was followed and approved after a review of the authorities in *Young v. Waters Pierce Oil Company* (Mo. Sup.), 84 S. W. 929. The fact then that there was no direct contractual relation between the plaintiff's husband and the transit company will not prevent a recovery by the plaintiff, in view of the highly dangerous character of the electric wires about which plaintiff's husband was required to work. As was said by the Supreme Court of New Jersey in *Van Winkle v. American Steam Boiler Insurance Company,* 19 Atl. 472:

"The law hedges around the lives and persons of men with much more care than it employs when guarding their property, so that in this particular it makes every one in a way 'his brother's keeper,' and therefore it may be well doubted whether in any supposable case redress should be withheld from an innocent person who has sustained immediate damages by the neglect of another in doing an act which if carelessly done threatens in a high degree one or more persons with death or great bodily harm."

In view of these legal principles, the insistence of counsel that the accident was one which the company could not have reasonably anticipated, and therefore was not bound for its failure to keep its electric cables properly insulated, would seem to be without merit. It was agreed on all hands that the insulation on these cables was safe enough when normal, but was shown to be of a kind to be easily affected by the extraordinary temperature to which the transit company knowingly and continually subjected them; and knowledge of the character of the insulation installed by itself, of the conditions under which it was maintained, and of the probable effect of those conditions on the safety of the insulation, must be chargeable to the defendant company. It knew, when it sent the plaintiff's husband to work about those cables, the kind of insulation it used, and, being in the exclusive control of the basement, the jury was justified in inferring that it had a knowledge of the condition of the insulation, and that it had in fact become soft and imperfect. While it is true that the evidence does not disclose exactly how the accident was occasioned, it does show that either the wrench or the

pipe which the deceased was handling at the time of his death came in contact with the wires beneath the insulation of the cable. If the former, it was in its use in turning the pipe, and owing to the softened condition of the insulation; if the latter, it was because the cable sagged, and touched the pipe, and the pipe in turning displaced the soft insulation, and thus touched the live wire. That neither could have happened if the insulation had been in a good condition is obvious and was conclusively proven by the testimony in the case. The evidence without any contradiction showed that these wires were safe to approach and handle when the insulation was in a proper condition, and while it is dangerous to a greater or less degree to approach live wires under any conditions and the deceased was aware of this and even mentioned it to his companion, the evidence was clear that if the wires had been properly insulated and maintained in proper condition the danger was not imminent, and a reasonable man would have felt that he could safely undertake to work in their vicinity. This court in the *Geismann Case*, cited and adopted the language of the Supreme Court of Louisiana in *Clements v. Electric Company*, 4 Am. Electl. Cas. 381, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 348:

"Electric wires are disarmed of danger if properly insulated. By looking one can see if there are evidences of insulation. If there are evidences of it, and no defects are visible after careful inspection, one whose employment brings him in close proximity to the wire, and which he has to pass, either over or under it, is not guilty of contributory negligence by coming in contact with it, unless he does it unnecessarily and without proper precaution for his safety. The wires, if properly insulated, would have been harmless."

In this case the wires had been insulated. The light in the basement was not sufficient to enable the deceased to inspect the insulation and the draught was so strong that he and his coworkman could not keep a candle or torch burning. There was sufficient light for them to do the work they were sent to do. They had every reason in these circumstances to assume that the wires were safely insulated, and that they could work about them without danger to themselves; and it must be held that the company in contracting for the work of installing the oil pipes anticipated, or in the exercise of ordinary care were bound to anticipate, that these workmen, while in the course of their employment, would touch or come in contact with these cables, and therefore the

principal contention of the defendant that it could not have reasonably anticipated the occurrence of such an accident as this appears to us entirely untenable, but that on the contrary the want of a proper insulation of these cables was the proximate cause of the injury to plaintiff's husband.

As to the other proposition advanced in support of the demurrer to the evidence, to wit, that plaintiff's husband was guilty of such contributory negligence as to bar a recovery, it is clear we think from the foregoing that deceased was not guilty of negligence in attempting to do his work under the conditions as they must have appeared to him as already detailed. There is no evidence whatever to support the claim that he was doing his work in a negligent manner; the presumption is that he was in the exercise of due care, and the question of his contributory negligence was duly submitted to the jury in the instructions given by the court.

2. It is urged that the court erred in its instructions in behalf of the plaintiff. These instructions were as follows:

"The plaintiff in this case sues the transit company to recover damages for the death of her husband, James P. Ryan, which occurred on the 11th day of May, 1901, as the result of an electric shock received by him while working in the basement of Power House No. 2 of the defendant. The plaintiff claims that this electric shock was due to the fact that the insulation of the electric wires was improper, imperfect, and impaired, and that their condition was due to the negligence of the defendant. The defendant denies that there was any negligence on its part, and asserts further that the accident was the result of the negligence of Ryan himself, by reason of his failure to exercise due care in the performance of his work. You have heard all the testimony in this case, and the court instructs you as follows concerning the law: The deceased, Ryan, was lawfully on the premises of the defendant. Although Ryan was working for an independent contractor, and was not under the control of the defendant, still it was the duty of the defendant to exercise ordinary care and diligence to have the premises in reasonably safe condition. By ordinary care and diligence is meant such care as persons of ordinary prudence would exercise under the same or similar conditions. If the insulation on the electric wires in question was in an imperfect and dangerous condition and if such condition was known to the defendant or could have been known by the exercise of reasonable care or inspection, and if Ryan received an electric shock by reason of such imperfect condition, and it was without any negligence on his part, then plaintiff is entitled to recover a verdict. The mere fact, however, that the insulation was in an imperfect condition would not make the defendant liable unless the further fact appears to your satisfaction from the evidence that the defendant knew or could have known of such defective condition by the exercise of due and ordinary care and inspection. On the other hand, you are instructed that defendant was not an insurer of the safety of

plaintiff's husband, and would not be liable for the mere fact that Ryan was killed from an electric shock on defendant's premises, nor would the defendant be required to use the most perfect kind of insulation, if that which was used was reasonably safe and proper under all the circumstances and facts in the case, and the defendant would not be liable if the death of Ryan resulted from accident without the fault or negligence of anybody. Plaintiff cannot recover in this case unless the evidence shows and until she has satisfied you by the greater weight of the testimony that the death of her husband was due to the negligence of the defendant as defined and explained in these instructions in permitting the insulation to be imperfect. You are further instructed that with regard to the question of contributory negligence which defendant sets up in his answer, if the accident to Ryan was the result of his own negligence and carelessness in working in a place which a reasonable person in his position would know to be dangerous, or of his negligence and carelessness as to the manner in which he performed his work, and that his carelessness and negligence directly contributed to the injury, then plaintiff is not entitled to recover. A workman has no right to work in a place which is obviously dangerous, and if he does so, he takes the risks which are naturally incident to such a situation; but the mere fact that Ryan may have known that the place was dangerous would not in itself deprive the plaintiff of the right to recover, if in point of fact the accident resulted from the negligence of the defendant, and if Ryan, while working in proximity to the cables, exercised such care and caution as a man of ordinary care and prudence in his calling would exercise under like circumstances, and although he may have known there was danger, yet if the danger was not such as to threaten immediate injury to him, or if he might have reasonably supposed that he could safely work in proximity to said wires by the use of care and caution, then he cannot be said to have been guilty of contributory negligence."

The objection to these instructions seems to be that the instructions do not follow the allegations of the petition. We think the objections urged against these instructions are extremely hypercritical. Leaving out the preliminary statement of the court as to the respective claims of plaintiff and defendant, it is obvious that when the court came to charge the jury what facts would authorize the recovery by the plaintiff, it told the jury that the defendant was not required to use the most perfect form of insulation, and that if that which the defendant was using at the time was reasonably safe and proper, there could be no recovery, but if the insulation was in an imperfect and dangerous condition, and this condition was known to the defendant or could have been known by reasonable care and inspection, and if the deceased received an electric shock by reason of such imperfect condition without any negligence on his part, then the plaintiff was entitled to recover. The instruction was more favorable to the defendant than was authorized by the decision in the *Geismann Case*, but

of this the defendant is in no condition to take advantage, as instruction was more favorable to it than it had a right to demand. The criticism on the instruction on contributory negligence, we think, is without any merit. The instruction taken as a whole and read all together was a fair and correct enunciation of the doctrine of contributory negligence as applied to the facts of this case.

3. Error is also assigned in the refusal of certain instructions prayed by the defendant. We have carefully gone through each one of these requests and noted the objections of defendant's counsel and without incumbering this opinion with a critical analysis of each of them, we must content ourselves with saying first to those which were applicable to the issues on trial, they were fully covered by those given by the plaintiff. The others had no relevancy to the case, and were properly refused on that ground, and could only have served to have misled the jury and turned their attention from the real facts of the case.

After full consideration of the record, we find no reversible error, and the judgment of the Circuit Court is affirmed.

STARK v. MUSKEGON TRACTION & LIGHTING CO.

Michigan Supreme Court — Oct. 31, 1905.

12 Detroit Legal News 550, 104 N. W. 1100.

1. INJURY TO CHILD BY SWINGING BROKEN TELEPHONE WIRE AGAINST ELECTRIC LIGHT WIRES — ORDINANCE — PRESUMPTIONS. — The failure of an electric light company to comply with an ordinance providing that its wires should be supported twenty-five feet above the ground, does not raise the presumption that it caused or contributed to the injury of a child who received a shock from a broken telephone wire which had been thrown against an electric light wire by playmate.
2. SAME — IGNORANCE OF DANGER. — The presumption that a child was not aware of the danger of seizing a telephone wire, which had been thrown over a defectively insulated electric light wire, does not operate, of itself, to charge the electric light company with responsibility for injuries.
3. SAME. — PROXIMATE CAUSE — TRESPASSERS — WRONGDOERS. — Defendants' insulated wires were supported about nineteen feet above the ground and two feet below were telephone wires. Plaintiff, a boy ten years of

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Trespassers — Liability of Electric Company for Injuries to. — See *Daltry v. Media Electric L., H. & P. Co., ante,* and note thereunder.

age, was holding one end of one of the telephone wires which was broken, the other end was thrown against one of defendants' wires, at a place where it was not insulated, by a playmate, sending a current through the broken telephone wire and injuring plaintiff. It appeared that plaintiff knew that other children had received a shock in the same manner. *Held*, (1) That neither the distance of defendants' wires from the ground, nor the fact, if it is a fact, that one of them was defective as to insulation, can be said to be the proximate cause of the injury. (2) That whether or not the plaintiff was a trespasser he was certainly a wrongdoer, who but for his acts of wrongdoing would not have been injured. (3) That a condition and relation of things was shown to exist which was safe and harmless unless unwarrantably interfered with.

Error by plaintiff from judgment for defendant. *Affirmed.*

Statement of facts by OSTRANDER, J.:

Two errors are assigned upon the record, both of which make the single point that it was error for the court to direct a verdict for defendant. The record contains the substance of all the testimony given upon the trial. The injury complained about was received August 30, 1903. The plaintiff is a lad, ten years old in April, 1903. Defendant is a Michigan corporation, owning a plant for developing electricity for lighting and other purposes, and at the date in question was operating its plant and wires connected therewith, including a system of wires supported by poles on and over Spring street in the city of Muskegon. The case made by the declaration is, in substance, that the wires of defendant were, at the place of the accident, carried too near the ground, and were not insulated; that on the same poles, and under the defendant's wires, certain telephone wires were carried; that the condition and position of the wires permitted contact, or that contact occurred between the telephone wires and the other and uninsulated wire; and "that the injuries complained of were caused by the defective and unsafe construction and maintenance of such wires and the defective and unsafe stringing of the wires of the [defendant] at the place aforesaid, and in permitting and maintaining said wire too near the surface of the ground at the place aforesaid, and in allowing the wires herein designated as telephone wires to be and remain on and connected with the poles on which was strung the wires through which the defendant was transmitting a dangerous electrical current." It is alleged that plaintiff, without fault on his part, and without any knowledge of the danger, came in contact with the telephone wire which, owing to carelessness and negligence of defendant, was at the time charged with electricity, and was injured. There is no dispute about the facts. No testimony was introduced on the part of defendant. At the pole near which the injury was received, the wires of defendant were supported on arms, two wires each side of the pole and some distance away from the pole. One witness, the father of the plaintiff, testified that they were nineteen feet and eight inches, and another that they were twenty feet and nine inches, above the ground. Two feet below these wires, supported by single brackets with glass insulators, were two telephone wires, about three inches from the pole. They were not directly under the electric light wires, one was above the other, and they were several inches apart. There is no testimony showing or tending to show that the de-

fendant's wires or the telephone wires were not properly and securely placed and supported, or that they were, in position, dangerous or likely to become dangerous. Plaintiff, with other children, was playing on Sunday afternoon in Spring street. One of the boys, playing with a ball and chain, threw it up to the lower telephone wire, to which it became fastened by reason of the chain winding around the wire. A sister of the boy, using a rake, the teeth of which she hooked into the chain, in her effort to get it down broke the telephone wire. A boy took one end of the broken wire, twisted it about a post, and then carried the end to a tree, up which he climbed to put it over a limb of the tree. The other end of the broken wire was made a plaything by the children, who, plaintiff aiding, swung it in the air against the wires of defendant, apparently for the purpose of making and hearing the wires rattle. "They would get hold of the end of it and get it back and form a loop, swing it around in a half-oval shape, and let go of it and strike the electric light wire to hear it rattle." "They would get hold of the end of it and then leave it somewhat slack, and then swing it round and round and as they let it go it would fly up and hit the other wires and rattle. They were out there engaged in that play probably half an hour." In this way they finally threw the telephone wire over the electric light wires, or one of them. "At the time Willie Stark [the plaintiff] threw the wire up over the electric wire, I had hold of the long piece of wire. When Willie Stark threw the short piece of wire up over the electric light wire, then I got a shock in the long piece of wire that I had hold of." The boy who first felt the current told the others, another boy tried it, and received a shock. The plaintiff, proposing to try the experiment, was asked by his sister and another not to do so. Saying, "Watch me; I am not afraid," he took the wire and received the injuries for causing which he seeks to charge defendant.. After the injury, on that day and the next day, persons noticed that in spots or small places there was no covering, no insulation on the electric light wire over which the telephone wire had been thrown. It is supposed, by at least one witness, that the telephone wire rested finally upon one of the bare or uncovered spots on the electric light wire, at a point where it was spliced; that the current was carried into the adjoining house from which a telephone had been a short time before removed, leaving the wires supplying the telephone in place with this

Turner & Turner and *Cross, Lovelace & Ross,* for appellant.

Nims, Hoyt, Erwin, Sessions & Vanderwerp, for appellee.

Opinion by OSTRANDER, J.:

It is not apparent that the requirement, by ordinance, that wires should be supported twenty-five feet above the ground was based upon any idea of safety of the public. Failure to comply with this provision of the ordinance is not the negligence charged. If it was, it is not to be presumed that it caused or contributed to the injury complained about. See, also, as to the right of this plaintiff to complain of the violation of the ordinance. *Flanagan v. Sanders* (Mich.), 101 N. W. 581. Whether or not the wires of defendant were exposed before the telephone wire was broken does not appear, nor does it appear whether it is possible, or, observing proper rules, usual, to prevent some exposure of copper wire of the size and kind, in the making of splices. Whether the substance with which the wires were covered could or probably would be removed by being struck by the telephone wire, as it was swung against it, does not appear. It is, however, decisive of the case that plaintiff has conclusively shown a condition and relation of things which, as to himself and the public generally, was safe and harmless if not interfered with, has shown neither invitation nor inducement warranting or excusing interference, and has just as conclusively proven an interference, participated in by himself, the character and the results of which were not to be reasonably apprehended or guarded against. Whether or not, under the circumstances of this case, we apply the term "trespasser" to one of plaintiff's years (*Trudell v. Railway Co.,* 126 Mich. 73, 85 N. W. 250, 53 L. R. A. 271; *Henderson v. Citizens' S. Ry. Co.,* 116 Mich. 368, 74 N. W. 525), he was certainly a wrongdoer, who but for his acts of wrongdoing would not have been injured. Indulging the presumption that plaintiff was not aware of the danger of seizing the telephone wire does not operate, of itself, to charge defendant with responsibility for what occurred. Neither the distance of defendant's wires from the ground, nor the fact, if it is a fact, that one of them was defective as to insulation, can be said to be the proximate cause of the injury.

The judgment is affirmed.

GUINN v. DELAWARE & A. TELEPHONE CO.

New Jersey Court of Errors and Appeals — Nov. 20, 1905.

(N. J. Law), 62 Atl. 412.

DEATH FROM CONTACT WITH TELEPHONE GUY WIRE CROSSED BY ELECTRIC LIGHT WIRE — NEGLIGENCE OF TELEPHONE COMPANY — TRESPASSERS. — A telephone company maintained a guy wire in such a position that it was likely to and did become crossed with an electric light wire and charged with a deadly current of electricity. The guy wire broke, and the decedent came in contact with it and was killed. He was at the time in an open field, which the public were accustomed to cross without objection by the landowner. Whether he was there of right or as a trespasser did not appear. *Held:*

1. That the telephone company was under a duty to the decedent to exercise care, even if he was a trespasser as between himself and the landowner.

2. That the jury might infer negligence from the omission of a guard between the electric light wire and the guy wire.

3. That the telephone company was not excused because the danger arose after the construction of the telephone line and was due to the running of the electric light wire below the guy wire; the care required changed with the changed circumstances.

(Syllabus by the Court.)

Error by defendant from judgment for plaintiff. *Affirmed.*

E. A. Armstrong, for plaintiff in error.

Peter Backes, for defendant in error.

Opinion by SWAYZE, J.:

William C. Guinn, a lad 13 years of age, was killed by contact with a guy wire charged with electricity. The wire was of a character used for telephone construction, copper wire of a tensile strength of 250 pounds. It was attached to a pole on which were strung wires of the defendant alone. There was not proof except by inference that the defendant erected or owned the pole or had attached the wire. In answer to an interrogatory, the defendant stated that the wire had been inspected May 27 or 28, 1904, about three weeks before the injury. No testimony was offered by the defendant. The trial judge left it to the jury to say whether the wire was put there by the servants of the defendant. We think there was sufficient evidence to warrant the inference that such was the fact. The injury was caused by the guy wire breaking and falling on an electric light wire belonging to another company.

The broken end fell in the grass in a field belonging to Gulick. Across this field people were accustomed to travel without objection, but as far as appears without other right. The boy's body was found still in contact with the guy wire shortly after the shock. It does not appear that he had any right to be on Gulick's property, except such as may be inferred from the facts stated. The contention of the defendant is that it was under no duty to the decedent for the reason that he was a trespasser on Gulick's property or at best a mere licensee. The liability of the defendant rests upon the fact that it was maintaining wires which might become charged with a deadly current of electricity. *New York & New Jersey Telephone Co. v. Bennett,* 7 Am. Electl. Cas. 543, 62 N. J. Law, 742, 42 Atl. 759; *Brooks v. Consolidated Gas Co.,* 9 Am. Electl. Cas. 35, 70 N. J. Law, 211, 57 Atl. 396.

The duty to exercise care is established as to travelers upon the highway and employees of the defendant or of another company who in the exercise of their rights are likely to come in contact with the wires, and of persons who are lawfully in a place of proximity to the wires. The question presented in this case is whether the duty exists also as to third persons who are not at the time in the exercise of any legal right. The principle underlying the case is stated by Chief Justice BEASLEY, in *Van Winkle v. American Steam Boiler Company,* 52 N. J. Law, 240, 247, 19 Atl. 472, to be that in all cases in which any person undertakes the performance of an act which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons, known or unknown, the law, *ipso facto,* imposes as a public duty the obligation to exercise such care and skill. The test of the defendant's liability to a particular person is whether injury to him ought reasonably to have been anticipated. In the present case, the guy wire was stretched over an open field across which people were accustomed to travel without objection by the landowner. The adjoining field was used as a ball ground. It was probable that, if the guy wire broke, some one crossing the field would come in contact with it. That whoever did so was a trespasser or a bare licensee, as against the landowner, cannot avail the defendant. If a bare licensee, he would still be there lawfully. If a trespasser, his wrong would be to the landowner alone, not a public wrong, nor a wrong to the defendant.

The case differs from one where a trespasser or licensee seeks to recover of the landowner. A landowner may, in fact, reasonably anticipate an invasion of his property, but in law he is entitled to assume that he will not be interfered with. His right to protect his possession and to use his property is paramount. It is these considerations which led this court to deny the liability of the defendant in the turntable cases. *Turess v. N. Y. S. & W. R. R.*, 61 N. J. Law, 314, 40 Atl. 614; *D., L. & W. R. R. v. Reich*, 61 N. J. Law, 635, 40 Atl. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727; and in *Friedman v. Snare & Triest Co.* (N. J. Err. & App.), 61 Atl. 401. The general rule is that a person is liable for those results of his negligence which are reasonably to be anticipated, the exemption of the landowner from liability as to trespassers and licensee is necessary to secure him the beneficial use of his land; but no reason exists for extending this exemption to the case where the rights of the defendant have not been interfered with. There is no proof that the defendant had any right to maintain the pole and wires; but, even if it had, the deceased is not shown to have interfered with the defendant's rights. The right to maintain the pole and wire did not involve the right to have the wire swing loose or occupy another portion of the field. Whoever interfered with the pole and wire in place, might be a trespasser, but he would not be a trespasser upon the defendant's rights if he came in contact with the wire elsewhere.

The trial judge in his charge rested his refusal to nonsuit upon the theory that the defendant had no right to stretch the guy wire, and he therefore refused to charge that the mere fact that the boy was there as a licensee defeated the plaintiff's right to recover. We think that even if the defendant had a right to stretch the guy wire, the plaintiff might still be entitled to recover. There was no error in the refusal to charge. The judge was asked to charge that the jury must be satisfied by the greater weight of the testimony that the defendant company was negligent, or the verdict must be for the defendant. He charged that it must appear by the weight of probabilities that the defendant's servants put the guy wire there. He then left it to the jury to say whether the defendant was negligent in doing something which it did, or in leaving undone something which it should have done.

In a case where the testimony was in conflict, the defendant

would be entitled to have this request charged; but in the present case, there was no conflict of testimony, and the only question was whether the jury would draw an inference of negligence from undisputed facts. Under the decision of this court in *Newark Electric Co. v. Ruddy,* 7 Am. Electl. Cas. 524, 62 N. J. Law, 505, 41 Atl. 712, 57 L. R. A. 624, *affirmed* 63 N. J. Law, 357, 46 Atl. 1100, 57 L. R. A. 624, in the absence of explanation by the defendant of the cause of the breaking of the wire, no other inference was open. The present case is even stronger, for here there was proof that the wire was of less tensile strength, though of greater durability, than the wire ordinarily used for that purpose. It was permissible for the jury to infer that the omission of a guard between the electric light wire and the guy wire was an act of negligence. *Rowe v. N. Y. & N. J. Telephone Co.,* 7 Am. Electl. Cas. 626, 66 N. J. Law, 19, 48 Atl. 523. Although the danger arose after the construction of the telephone line, and was due to the running of the electric light wires below the guy wire, the care required of the telephone company changed with the changed circumstances. *Rowe v. N. Y. & N. J. Telephone Co.,* 7 Am. Electl. Cas. 626, 66 N. J. Law, 19, 48 Atl. 523.

The judgment should be affirmed, with costs.

AUGUSTA RY. & ELECTRIC CO. v. WEEKLY.

Georgia Supreme Court — Nov. 20, 1905.

4 St. Ry. Rep. 151, 124 Ga. 384, 52 S. E. 444.

1. NEGLIGENCE — PLEADING AND PROOF. — In a suit to recover damages for personal injuries alleged to have been sustained by reason of negligence on the part of the defendant, the plaintiff must recover, if at all, upon proof establishing the specific acts of negligence alleged in his petition.
2. TRIAL — INSTRUCTIONS — INVADING PROVINCE OF JURY. — Even in a case to which the doctrine of *res ipsa loquitur* is applicable, it is erroneous for the court to charge the jury that a given state of facts either constitutes, or affords *prima facie* proof of, negligence, where there is no statute expressly declaring that this is true as matter of law.
3. ELECTRICITY — STREET RAILROADS — LIVE WIRES — INJURY TO PEDESTRIAN. — The charge of the court being in certain respects inaccurate and prejudicial to the excepting party, a new trial is ordered.

(Syllabus by the Court.)

Appeal by defendant from judgment for plaintiff. *Reversed.*

William H. Barret and *Boykin Wright,* for plaintiff in error.

C. Henry Cohen and *Bryson Crane,* for defendant in error.

Opinion by EVANS, J.:

The plaintiff below, Joseph Weekly, brought an action for damages against the Augusta Railway & Electric Company, alleging that he had received serious injuries by coming in contact with a live wire belonging to the defendant company, which was lying across a public thoroughfare in the city of Augusta. The trial resulted in a verdict in favor of the plaintiff, and we are called on to determine whether or not the company's motion for a new trial should have been granted.

1. Our attention is called, in the first place, to the fact that the investigation of the case was not confined to the issues raised by the pleadings. The plaintiff alleged in his petition that the breaking of the wire and the falling thereof to the ground were due to the negligence of the company in its maintenance of the wire, and that "the falling of said wire to the ground, as aforesaid, was due to the negligence of the said defendant in creating negligently, and maintaining, a dangerous condition that made the injury to the petitioner possible." No complaint was made that the company did not exercise due diligence in discovering that the wire had fallen, or that the company was negligent in not promptly cutting off the deadly current with which it was charged, or that the company had failed to take proper steps to remove the wire from the street after it fell. The court declined a written request to give to the jury a charge presented in behalf of the company, wherein the specific acts of negligence upon which the plaintiff relied for a recovery were correctly stated and attention directed to the fact that a negligent failure to cut off the current was not alleged, and in which the proposition was laid down that no acts of negligence other than those alleged in the petition could be proved or considered by the jury. The court did, in general terms, instruct the jury that if they shauld find "the defendant was guilty of the acts of negligence set out in the declaration," and injury to the plaintiff resulted therefrom, while he was in the exercise of ordinary care and diligence, he would be entitled to recover. But nowhere in the charge did the court undertake to inform the jury what were "the acts of negligence set out in the

declaration," and, in charging the jury as to what would constitute due negligence on the part of the company, instructed them as to the duty resting on the company not to permit a wire, after it had fallen, to remain in a dangerous condition for an unreasonable length of time. Indeed, throughout the entire charge the court made the liability of the company depend, not alone upon the question whether or not it had exercised all ordinary and reasonable care in "constructing, maintaining, and inspecting its wires," but upon the further inquiry whether or not it had, "after the fall, exercised such care in repairing same."

2. A charge of which the plaintiff in error makes special complaint was in the following language:

> "If the jury believe that a horse attached to a brewery wagon stepped on a wire belonging to the Augusta Railway & Electric Company and fell to the ground in a dying condition, and the driver was thrown to the ground, receiving a shock and burn, it would be *prima facie* proof of defective insulation and negligence."

Unless the commission of a particular act or an omission to do a particular thing be declared by law to constitute negligence, it is error for a judge to instruct the jury that such act or omission amounts to negligence. He cannot invade the province of the jury by declaring that a given state of facts raises a presumption of negligence, when this is not true as a matter of law. *Central Ry. Co. v. McKenney,* 116 Ga. 13, 17, 42 S. E. 229, and cases cited. It must now be accepted as the settled law of this State that

> "On the trial of a suit for damages alleged to have been occasioned by the negligence of the defendant, it is always error, requiring the grant of a new trial, for the court to charge the jury that given acts constitute negligence, when such acts are not declared by statute to be negligent." *Augusta Ry. Co. v. Smith,* 121 Ga. 29, 48 S. E. 681.

And it has been held that, even when the plaintiff's petition is good as against a general demurrer, it is erroneous for the judge to charge the jury that,

> "If the defendant's failure to do its duty 'was in accordance with the allegations of the plaintiff's petition, then that would be negligence, as he charges in this case.'" *City of Rome v. Sudduth,* 121 Ga. 420, 49 S. E. 300; *Atlanta R. Co. v. Hudson,* 123 Ga. 108, 51 S. E. 29.

It is urged by counsel for the defendant in error that in the present case the judge merely undertook to instruct the jury as

to the doctrine of *res ipsa loquitur,* which was, under the decision in *Chenall v. Palmer Brick Co.,* 117 Ga. 106, 43 S. E. 443, unquestionably applicable to the facts of this case. A complete reply to this suggestion is to be found in the opinion delivered in that case by Mr. Justice COBB, when it was again before this court (119 Ga. 837, 47 S. E. 329), who said:

"Under our system, where every question of negligence is left for determination by the jury, even in cases where the maxim under consideration (*res ipsa loquitur*) is applicable, the judge should not charge the jury that there would be an inference of negligence from a given state of facts, but should instruct them in clear and unequivocal terms that negligence must be proved, and it is for them to consider whether the manner of the occurrence and the attendant circumstances are of such a character that they would, in their judgment and discretion, be authorized to draw an inference that the occurrence could not have taken place if due diligence on the part of the master had been exercised."

See page 843 of 119 Ga., page 330 of 47 S. E., and note the discussion which precedes and follows the above quotation. This was not a case, as the court below recognized, where any presumption of negligence arose upon proof of the injury, under the provisions of the Civil Code of 1895, § 2321, but the plaintiff was bound to assume the burden of establishing by sufficient evidence the acts of negligence alleged in his petition.

3. In certain particulars, other than those above mentioned, the charge of the court was open to criticism, as pointed out in the motion for a new trial. After charging as requested touching the diligence to be expected of the company to a traveler on a public street, his honor added that if the company failed to exercise ordinary care and diligence under the circumstances, and injury resulted, it "would be liable." He should, of course, have qualified this statement by informing the jury that this would be true only in the event the plaintiff was not chargeable with negligence which was the cause of his injury, and could not by the exercise of ordinary care have avoided the consequence of defendant's negligence, if it was the proximate cause of the injury. While charging upon this phase of the case, the court further instructed the jury, in effect, that when an electric railway company has used ordinary care and diligence, such as a prudent man would use, "in the erection and maintenance of wires containing electricity of this degree, and without fault injury occurs, there would be no liability." The complaint made of this instruction is that

the use of the words "without fault," in the connection in which they were employed, subjected the defendant to a higher degree of diligence than that imposed by law. The charge of the court was, in other respects than those above pointed out, free from any serious verbal inaccuracies, and sufficiently covered the law bearing on the case. Certain requests to charge with respect to the duty devolving upon the company to exercise ordinary diligence to prevent injury to the plaintiff were refused; but, as they embraced instructions as to the obligation resting on the company to ascertain the fact that one of its wires had fallen and to remove the incident danger within a reasonable time, these requests were not pertinent to any issue raised by the pleadings, and the company cannot justly complain that they were not given in charge. As already stated, the investigation should have been confined to a consideration of the question whether or not the falling of the wire was due to negligence on the part of the company, since it was not charged with any lack of diligence in failing to remove the wire from the street or rendering it harmless before the plaintiff came into contact with it.

Judgment reversed. All the justices concurring.

FOX v. VILLAGE OF MANCHESTER ET AL.

New York Court of Appeals — Nov. 21, 1905.

183 N. Y. 141, 75 N. E. 1116.

1. DEATH FROM CONTACT WITH TELEPHONE WIRE ACROSS ELECTRIC LIGHT WIRE — EVIDENCE. — In an action against a village *et al.* for the death of a traveler by coming in contact with a telephone wire which hung across an electric light wire between the sidewalk and the road, it was *held* that it was error to read in evidence the testimony of the trustees taken at the inquest held by the coroner on the body of the deceased.
2. SAME. — It was error to allow the plaintiff to prove, for the purpose of charging the defendants with knowledge of the dangerous condition of the wires, that eight or ten months previous to the accident to the deceased a piece of telephone wire in front of a bakery, at a point nearly a quarter of a mile from the scene of the accident, hung down from a pole nearly to the ground, and that several children and one grown man had received shocks therefrom. It appeared that promptly on this occurrence

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Liability of City for Negligence in Maintaining Electric Plant. — See *Davoust v. City of Alameda, post,* and note thereunder.

the trustees caused the wire to be cut off at the top of the pole, and that thereafter there was no more trouble.

3. SAME — LIABILITY OF MUNICIPALITY. — A municipality is not bound to inspect the insulation of electric wires, the position in which they are strung, and similar matters involving technical knowledge, except in the case of an obvious danger or exceptional occurrence. The company maintaining the line of wire is primarily liable for its negligent or defective condition in these respects.

Appeal by defendant from a judgment of the Appellate Division, affirming a judgment for plaintiff entered on a verdict and an order denying a new trial. *Reversed.*

George Raines and *E. A. Griffith,* for appellant village of Manchester.

Frank Rice, for appellant Ontario Light & Traction Co.

E. A. Kuntzsch, for respondent.

Opinion by CULLEN, C. J.:

The action was brought to recover damages for the alleged negligence of the defendants, by which was caused the death of the plaintiff's intestate under the following circumstances: The principal street of Manchester, a village with about 700 inhabitants, runs north and south. The line of wires of the light and traction company entered the village at the intersection of the right of way of the Lehigh Valley Railroad, and was carried north along the street in front of a cemetery as far as a church, for which it furnished light. There had been also along the main street telephone wires, which were strung on the poles of the traction company as far as the church, and from that point north to the center of the village on another set of poles. The telephone wire had not been in use for some time. On the occasion of the accident, which occurred about half-past 8 in the evening, the deceased, crossing the street, seized hold of or came in contact with a piece of wire that hung down from a tree to the ditch between the sidewalk and carriageway, and received an electric shock by which he was immediately killed. The point at which the accident occurred was in front of the cemetery and between the church and the railroad crossing, where the light and traction company maintained its line. An examination the next morning showed that the telephone wire lay across the light wires, and that the

insulation on the wires had worn away, and that the hanging wire was a part of the telephone line. How long this piece of wire had been hanging down was a matter of controversy on the trial. That the current which caused the death of the deceased came from the light wire, through the telephone wire, is conceded. The plaintiff charged that the light company was negligent in permitting its wires to remain in a dangerous and unprotected condition, and that the village was negligent in allowing that condition to remain by which the safety of travelers on the highway was imperiled. A verdict was recovered against both the defendants, and the judgment entered thereon has been affirmed by the Appellate Division by a divided court.

The contributory negligence of the deceased was a question of fact for the jury. It was not negligence as a matter of law to cross the street at a point other than the crosswalk. Nor was deceased necessarily negligent in having seized hold of the wire. It may have come in contact with his person, or he may have seized it to remove it from his way. The negligence of the village was also a question for the jury, to be determined with reference to the length of time they might find the wire had been hanging down, whether the village authorities knew or should have known of its condition, and also to the place at which it was hanging, whether it was likely at that point to be dangerous. There were, however, errors committed on the trial which require a reversal of the judgment.

To establish notice to the trustees of the dangerous condition of the electric wire, the plaintiff, over the objection and exception of the village, was allowed to read in evidence the testimony of the trustees taken at the inquest held by the coroner on the body of the deceased. That the declaration of an agent or that of an officer of a corporation is not evidence against his principal, except when made in the course of his agency or in the discharge of his official duties, is settled law. *First Nat. Bank v. Ocean Nat. Bank,* 60 N. Y. 278, 19 Am. Rep. 181. It is contended, however, that a different rule applies to declarations the only object of which is to show knowledge of or notice to the person making them, and in support of that claim two decisions of the Appellate Division are cited. *Shaw v. Town of Potsdam,* 11 App. Div. 508, 42 N. Y. Supp. 779; *Vandewater v. Town of Wappinger,* 69 App. Div. 325,

74 N. Y. Supp. 699. It may be that declarations of a village official as to the condition of a highway, made not only before the occurrence on which it is sought to charge the village with liability, but sufficiently long before to have made it the duty of the village, with the knowledge which the declaration imports, to repair the highway, are competent evidence. In such a case a declaration would not be competent as an admission, but as evidence of the state of the knowledge of the person making the declaration. Such was the case in *Shaw v. Town of Potsdam, supra.* The knowledge of the officer or agent after the transaction is of no materiality whatever, and his declaration then made of his previous knowledge is as purely hearsay as a declaration of any previous act. The doctrine of *Vandewater v. Town of Wappinger, supra,* is manifestly erroneous and cannot be upheld. The respondent contends that this error was rendered harmless by the subsequent testimony of the trustees. It is asserted that the trustees on the trial of this action testified substantially to everything that they had testified to before the coroner. This claim is not wholly justified. Smith, one of the trustees, testified positively that he did not see the wire which killed the deceased hanging down from the tree, and that he had made no statement before the coroner to that effect. It is true that the testimony given before the coroner would have been competent for the purpose of contradicting Smith's testimony on the trial; but this would not authorize its use as affirmative evidence to show that the trustees of the village had notice of the dangerous condition of the pendent wire.

For the purpose of charging the defendants with the knowledge of the dangerous condition of the wires, the plaintiff was allowed to prove, over the objection and exception of the appellants, that eight or ten months previous to the accident to the deceased a piece of telephone wire in front of a bakery, at a point nearly a quarter of a mile from the scene of the accident and far to the north of the church, where the light wires terminated, hung down from a pole nearly to the ground, and that several children and one grown man had received shocks therefrom. It appeared that promptly on this occurrence the trustees caused the wire to be cut off at the top of the pole, and that thereafter there was no trouble. We think this occurrence was too remote in time and in distance

to be competent evidence, and that its admission was erroneous. It is contended that the fact that persons had received shocks from the telephone wire at this point should have apprised the trustees that the telephone wire and the light wires must at some point to the south have been in contact, and therefore dangerous, and that the trustees should thereupon have inspected the two lines, and either had the telephone line removed or the position of the wires changed. This view was substantially accepted by the trial court, which charged, over the exception of the defendant village, that the law imposed on the officials of the municipality the duty of making an inspection from time to time to see whether the wires, if dangerous, had been remedied or removed. We are of a different opinion. Nobody had received substantial injury by the hanging wire at the bakery. The children had played with it and thus received the shocks. It is true one man is said to have been knocked down, but it appears that he was intoxicated at the time. The trustees discharged their duty when they cut off and removed the pendent wire. There was nothing so alarming in the fact that children playing with the wire had received shocks from it, in no case with serious results, that rendered it necessary or the duty of the trustees to inspect the whole length of the wires to examine their insulation and see that at all points they were in proper condition. Though the law authorizes the construction of electric light lines, power lines, telephone lines, and similar structures along the streets and highways, that does not relieve the municipality from its duty to see that the streets and highways are kept reasonably safe and secure for the public using them. But this doctrine is not to be carried to the extent of holding that the obligation of the municipality is coextensive with that of the company which maintains the line. Principally the duty of a municipality is to see that its streets and highways are kept safe and secure for passage over the surface, for the primary object of highways is to enable the public to travel thereon. Therefore it must always be alert to prevent or guard obstructions in the highways. Where, however, the danger to the traveler is not in the nature of an obstruction, but proceeds from the negligence of a third party in the use of the highway in a manner authorized by law, the municipality should not be held liable for that negligence unless it has notice thereof, or the condition is apparent and the danger

obvious. The municipality may well be held to the same degree of responsibility with regard to electric light poles, telegraph poles, and the like that is imposed upon it with reference to awnings, gratings, and similar incumbrances on the street, and so, also, as to fallen or hanging wires obstructing the street and likely to strike or come in contact with the traveler. To go further, however, and impose upon a municipality the duty of inspecting the insulation of the wires, the position in which they are strung, and similar matters involving technical knowledge, unless in the case of an obvious danger or exceptional occurrence, would place upon it a very onerous and unfair burden. The company maintaining the line of wire is primarily liable for its negligent or defective condition in these respects, and should be solely so unless in the cases suggested of obvious danger or exceptional circumstance. It follows that, not only was the evidence of the shocks received from the fallen wire at the bakery improperly received, but the learned trial court erred in charging the jury that by reason of that occurrence it was the duty of the municipality to inspect the lines to see that the telephone wire had been removed or that the wires were no longer in contact. The case of *Twist v. City of Rochester,* 37 App. Div. 307, 55 N. Y. Supp. 850, *affirmed* 165 N. Y. 619, 59 N. E. 1131, is not in point. There it was a line of wire maintained and used by the defendant that caused the injury for which a recovery was had. The defendant's liability was predicated, not on the failure of its duty as a municipality to keep its streets safe, but on its negligence as the owner and operator of a telephone line, in which character its responsibility was just the same as that of a telegraph, telephone, or electric light corporation.

of another corporation strung on the poles by consent of the owner. In the first case the wire had fallen into the street, causing injury to a traveler who tripped on the fallen wire. In the second case a traveler on the street was injured by the fall of a glass insulator. In each case the corporation owning the line of poles was held not liable, on the ground that it was the negligence of the corporation operating and maintaining the line of wire which caused the injury. The present case differs essentially from those cited. There the injury was caused solely by the act or omission of a third party, to which the defendant in no way contributed except by the license given the third party to use the poles. Here it was the current of electricity developed by the traction company and conducted over its wires that caused the death of the deceased. Electric light wires, of all wires in common use, carry the most powerful currents. The intensity of the current conducted through that defendant's wire, as shown by the evidence in this case, was about 2,000 volts, the shock from which would be fatal to human beings. It was, therefore, the duty of that defendant to insulate its wires and guard against the electric current becoming a source of danger and injury to travelers on the highway or third persons, so far as reasonable care could accomplish that result. It was the owner and in possession of the poles, and it was not justified in granting permission to third parties to string wires so near light wires as to become dangerous to the public (*Jones v. Union Ry. Co.*, 18 App. Div. 267, 46 N. Y. Supp. 321), much less to allow those wires to come in contact with its own and destroy the insulation which should have prevented the escape of the current. It also owed the duty of reasonably inspecting its lines to see that its insulation was preserved intact and that the line had not become dangerous by contact with other wires. There is evidence in the record tending to show that the original construction was faulty on account of the proximity of the two lines of wire, and also that inspection would have shown their dangerous state and the defect in the insulation. The motion for a nonsuit by this appellant was, therefore, properly denied; but on account of the error already pointed out, in the admission of the evidence as to the occurrences at the bakery the year previous to the accident, the judgment against it must also be reversed.

The judgment should be reversed as to both appellants, and new trial granted, costs to abide the event.

GRAY, BARTLETT, HAIGHT, VANN, and WERNER, JJ., concur. O'BRIEN, J., absent.

Judgment reversed, etc.

BOURKE v. BUTTE ELECTRIC & POWER CO. ET AL.

Montana Supreme Court — Nov. 27, 1905.

33 Mont. 267, 83 Pac. 470.

1. INJURY FROM CONTACT WITH ELECTRIC WIRE STRUNG OVER A TRESTLE — PLEADING. — In an action against an electric light and power company and others for injuries received by contact with an electric wire strung over a trestle, the complaint alleged that the defendants on a certain day hung a wire, heavily charged, over, above, and across a trestle at a certain mine. The denial of these allegations was that any of the defendants, except the Butte Electric & Power Company, hung the wire mentioned in the complaint, and that any of the defendants hung the wire only three feet above said trestle. The answer also alleged that a certain wire, hung by the Butte Electric & Power Company, was so hung over and above said trestle, a distance of about four and one-half feet from said trestle. It was *held* that the answer contained a negative pregnant and admitted the existence of the trestle before the wire in question was placed in position.
2. SAME — CARE REQUIRED. — The owner or operator of an electric plant is bound to exercise a reasonable degree of care in erecting pole lines, selecting appliances, insulating the wires wherever people have a right to go and are liable to come in contact with them, and in maintaining a system of inspection by which any change which has occurred in the physical conditions surrounding the plant, poles, or lines of wire, which would tend to create or increase the danger to persons lawfully in pursuit of their business or pleasure, may be reasonably discovered.

Appeal by the defendants from a judgment in favor of plaintiff. *Affirmed.*

Statement by HOLLOWAY, J.:

This action was commenced in Silver Bow county by the plaintiff, Bourke, to recover damages for personal injuries received by him by coming in contact with an electric light wire charged with electricity. The defendants originally were the Butte Electric & Power Company, the Butte Lighting & Power Company, the Butte General Electric Company, and George T. Aiken. Afterwards, on plaintiff's motion, the action was dismissed as to the Butte Light-

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Care Required of Electric Companies. — See note to *Guest v. Edison Illuminating Co., post.*

ing & Power Company and the Butte General Electric Company, and proceeded thereafter against the Butte Electric & Power Company and George T. Aiken.

The complaint alleges that the defendants were engaged in the business of furnishing light by electricity to the citizens of Butte and Meaderville, in Silver Bow county. Paragraph 5 of the complaint is as follows: "That on or about the 1st day of May, 1902, near Meaderville, in the said county of Silver Bow, Mont., the said defendants did cause to be hanged, about three feet above and across a trestle at the East Colusa mine, a certain copper wire, and charged the same with, and continued at all times thereafter to keep the same charged with, a current of electricity of a voltage of about 2,500 volts, that being sufficient in power to kill men of ordinary vitality, and to do great bodily harm to all men, whenever they might touch the same; that the said wire, on the 10th day of May, 1902, and long prior thereto, was insufficiently, carelessly, and negligently insulated, and that the defendants were well aware of the said want of insulation, or could with reasonable diligence or care have been aware of such want of insulation." It is further alleged that the wire mentioned in paragraph 5 was hung by the defendants, or by them permitted to hang, over and across said trestle so low that persons working over the trestle were in imminent danger of coming in contact with the wire; and that the wire was so low that it had to be moved and lifted up by persons working on the trestle. It is further alleged that this trestle belonged to the Boston & Montana Company, and that on the 10th day of May, 1902, this plaintiff, while in the employ of that company, was there lawfully hauling waste in tram cars along and over this trestle. Paragraph 7 of the complaint is as follows: "That the defendants, when they hung the said wire over the said trestle, and only about three feet above the said trestle, and without insulation as aforesaid, well knew that this plaintiff, and many other men employed by the said mining company, were daily employed in walking over the said trestle and must in the course of such employment touch the said wire." It is further alleged that, in order for plaintiff to get his cars back and forth along the track on this trestle, it was necessary for him to lift up said wire every time he passed, and that the defendants knew that it was necessary for him to do so, and that plaintiff did not know that this wire was in any manner charged with an electric current. It is alleged that the placing of this wire over the trestle so low, and the placing of it there without proper insulation, constituted acts of gross negligence and malicious recklessness on the part of the defendant company. It is further alleged that on the 10th day of May, 1902, it was raining; that the trestle was wet, and that, as plaintiff was pursuing his business and passing back and forth with his car, in attempting to lift the wire to let his car go by he touched the wire with his left hand; that the wire was then charged with electricity; that a current of electricity passed through him, caused him to hold on to the wire, burned all the flesh from the fingers and thumb of his hand, and otherwise caused him great pain and terrible anguish; that by reason of this injury he was confined to a hospital for eighteen weeks under the care of a physician; that he suffered daily great bodily pain; that the injuries inflicted upon him are permanent; that before the accident he was a strong and healthy man, capable of earning, and did earn, $3.50 a day; that by reason of this accident he will never be a strong man again; that he can-

not open his left hand, because of the fact that the muscles on the inside thereof were burned off; that the muscles of his legs and arms have become shrunken; that he continues to suffer pains throughout his body; that he is informed and believes that he will never be relieved of these; that by reason of the burning he has been rendered so weak that he cannot eat anything but soft food; that at the time of the burning he was about forty-five years of age; that since that time he has not been able to do any work or earn any money; and that he will never again be able to do any work, by reason of such injury. It is further alleged that the acts of the defendants, as set forth, were done maliciously and wantonly, and in criminal disregard of the rights and safety of all persons, and particularly of this plaintiff. Actual damages in the sum of $30,000 are asked, and punitive damages in the sum of $20,000 in addition thereto.

The answer denies that either or any of the defendants, except the Butte Electric & Power Company, was engaged in the business of furnishing light by electricity to the citizens of Butte and Meaderville, as charged in the complaint. There are specific denials that the wire mentioned in the complaint, strung over the trestle, was insufficiently or carelessly insulated, or that it was ever necessary for the plaintiff to lift the wire in hauling his car over the trestle, or that the plaintiff did not know that the wire was charged with an electric current. There is a denial of any knowledge or information sufficient to form a belief as to whether or not the plaintiff was injured, or the extent or character of his injuries. There is a further denial that, because of any act or thing done by the defendants, or either of them, the plaintiff was injured in any manner or at all. There is also a denial that any of the acts alleged in the complaint as having been performed by the defendants, or either of them, were done or performed maliciously or wantonly, or in criminal disregard, or any disregard, of the right of plaintiff or any person. The answer also contains allegations to the effect that over the trestle were strung two wires, one a primary wire, six and five-sixths feet above the trestle, and a secondary wire, four and one-half feet above the trestle; and it is alleged that the accident to the plaintiff was occasioned by the plaintiff taking hold of said primary wire and said secondary wire at one and the same time. It is alleged that it was not necessary for the plaintiff to take hold of either of these wires, and that his taking hold of either of them, or both at the same time, were acts of negligence on his part, which contributed to the injury which he received. With relation to the principal allegations of the complaint in paragraph 5, set forth in full above, the denials in the answer are so pregnant with admissions that they are set forth at length, as follows: "Deny that on or about the 1st day of May, 1902, or at any other time, near Meaderville, in said county of Silver Bow, or elsewhere, any of said defendants above named, save and except the Butte Electric & Power Company, did cause to be hanged three feet, or any number of feet, above or across a certain trestle at the East Colusa mine, or elsewhere, a certain copper wire, or charged the same with, or continued at any time thereafter to keep the same charged with a current of electricity of a voltage of about 2,500 volts, or any number of volts, or at all, or that any wire hanged by said defendants, or by either of them, save and except the Butte Electric & Power Company, was sufficient in power to kill men of ordinary vitality, or to do gross or any bodily harm to all men, or any men, whenever they might touch the same, or otherwise, or at

all. Deny that said defendants, or either of them, ever, at any time, strung or hanged said wire mentioned in said complaint, or any wire, or at all, over said or any trestle, only three feet, or about three feet, above said trestle; but in this connection and as a part of this denial, defendants allege that a certain wire strung by the Butte Electric & Power Company was so strung over and above said trestle a distance of four and one-half feet from said trestle, and called a secondary wire." There is not any denial whatever of the allegations of paragraph 7 set forth above.

The cause was transferred to Lewis and Clarke county, where it was tried to the court sitting with a jury. The jury returned a verdict in favor of the plaintiff, and judgment was entered thereon. The appeals are from the judgment, and from an order denying defendants' motion for a new trial.

J. L. Wines, Forbis & Matteson, and *M. J. Cavanaugh,* for appellants.

Robert B. Smith, H. L. Maury, and *John B. Clayberg,* for respondent.

Opinion by HOLLOWAY, J.:

1. The cause was apparently tried upon the theory that there was an issue raised by the pleadings as to whether the wire which caused the injury to plaintiff was placed in position before the trestle upon which plaintiff was at work was erected. The most casual reading of the pleadings will show at once that there was not any issue upon this question at all. The complaint in paragraph 5 above, in plain and unmistakable language, charges that the defendants, on or about the 1st day of May, 1902, hung this wire, charged with an electric current of 2,500 volts, over and above and across a trestle at the East Colusa mine. The denial of those allegations is that any of the defendants, except the Butte Electric & Power Company, hung the wire mentioned in the complaint over and above or across the trestle at the East Colusa mine; and that any of the defendants hung the wire mentioned in the complaint only three feet, or about three feet, above said trestle. The answer alleges that a certain wire hung by the Butte Electric & Power Company was so hung over and above said trestle, a distance of about four and a half feet from said trestle, and was called a secondary wire. These pregnant denials admit that the Butte Electric & Power Company strung the wire mentioned in the complaint, charged with an electric current of 2,500 volts, over the trestle at the East Colusa mine. The only denial is that such wire was only three feet, or about three feet, above the

trestle. If the trestle was not there before the wire was placed in position, it is hardly necessary to say that the wire could not have been strung over and across the trestle, and therefore the answer unmistakably admits the existence of the trestle before the wire which caused plaintiff's injury was placed in position. The particular wire which caused the injury is definitely identified in the proof as a primary wire; so that the trial court would have been justified in stating to the jury that there was not any issue upon the question, but that the answer admits that this wire with which plaintiff came in contact, was placed in position after the trestle upon which he was working was erected. But the defendants offered proof tending to show that there were four wires stretched over this trestle; that two of them were primary and two secondary wires; that the primary wires were charged with an electric current of from 2,000 to 2,500 volts, while the secondary wires were charged with only about 104 volts, which was not sufficient to have caused the injury complained of.

Acting upon the assumption that there was an issue as to whether the wire or the trestle was first put in place, the court submitted to the jury certain instructions of which complaint is made. One of these instructions (No. 9) was asked by the defendants and given by the court with a material modification. By this instruction the jury was told that, if they found from the evidence that the wire which caused the injury to plaintiff was strung by the defendants before the trestle was erected, that the trestle was erected by a third person without the knowledge or consent of the defendants, and was not used by the defendants, and that plaintiff was at work on the trestle for some person other than the defendants, and that the defendants did not know that the trestle was being used, and if they further found that the wire which caused the injury was strung a sufficient height above the surface of the ground to render it impossible for persons at work or traveling in that vicinity to come in contact with it by ordinary means, then the act of plaintiff in coming in contact with the wire was contributory negligence on his part which would preclude his recovery. To this extent the instruction was asked by the defendants, but the court attached to it this modification:

"Unless you find that the said defendants were guilty of negligence in not inspecting their property at such reasonable periods of time as would enable

them to know and discover that said trestle had been erected under their said wires and was being used as a passageway by human beings, and that the erection of said trestle had brought the said wires so close to persons passing across said trestle as to be dangerous to the lives and safety of human beings.'

The court, by instruction No. 12, told the jury that, if they should find from the evidence that the wire which caused the injury was strung before the trestle was erected, then they were instructed that it is the duty of persons or corporations transmitting electric currents that are dangerous to human safety or life to inspect their properties at reasonable intervals with a view of ascertaining what, if any, physical changes have taken place which might create or increase danger to human life; and in this case, if the jury should find that the property was not inspected at reasonable intervals, and that a reasonable inspection would have disclosed the existence of the trestle and the physical conditions surrounding it at the time the plaintiff was injured, then, in that event, the defendants were charged with knowledge of the existence of the trestle.

Objection is made to instruction No. 9 as modified, and to No. 12, in that they impose upon the defendants the duty of inspecting their lines of wire, even if the trestle was erected after the wire which caused the injury was strung. Appellants contend that, if it was found that the trestle was erected after the wire was put in place, then, as to the defendants, the plaintiff was a naked trespasser, and, as to him, the defendants did not owe the duty of inspection, and in support of this cite *Egan v. Montana Central Ry. Co. et al.*, 24 Mont. 569, 63 Pac. 832; *Beinhorn v. Griswold*, 27 Mont. 79, 69 Pac. 557, 59 L. R. A. 771, 94 Am. St. Rep. 818; and *Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 373. But the complaint alleges that the plaintiff was rightfully and lawfully in pursuit of his business at the time when, and place where, he was injured, and this is not denied. Neither is there anything in the pleadings or proof which would even tend to show that the owner of the trestle was, as to the owner of the wire, a trespasser. The wire was strung on and along a public street, and the trestle was built across the street at right angles with the course of the line of wire. As said before, the answer specifically admits that the wire was strung after the trestle was erected; but, if it be said that all parties proceeded in the trial court upon the theory that there was an issue raised as to this fact, still there is not anything

which would justify the conclusion that either the owner of the wire, or the owner of the trestle, was, as to the other, a trespasser. The law will not presume it, but, in the absence of any showing to the contrary, the presumption is that each alike was there lawfully. So that we may at once dismiss from our consideration any contention that the owner of the trestle was a trespasser; and this being so, the cases cited above from this State are not in point here. Defendants' liability to the plaintiff must therefore be determined by rules applicable to one injured by the alleged negligence of another, where the injured party was rightfully pursuing his business or pleasure at the time of his injury.

In 3 Current Law, 1182, the rule as to this liability is announced as follows:

"While one furnishing electricity is not an insurer, yet as to the public he is obliged to use the utmost human care, vigilance, and foresight, reasonably consistent with the practical operation of his plant, to provide against all reasonably probable contingencies; the care required in any particular case being proportional to the danger. This includes the use of the best mechanical contrivances and inventions in practical use, perfect insulation at all places near which people have a right to go, and, it has been held, perfect insulation of all overhead wires strung through streets, the consideration of climatic conditions, and the maintenance of such a system of inspection as will insure reasonable promptness in the detection of defects."

While this rule goes farther than it is necessary for us to go in this instance, we do adopt and approve it to the extent that it holds the owner or operator of an electric plant to a reasonable degree of care in erecting pole lines, selecting appliances, insulating the wires wherever people have a right to go and are liable to come in contact with them, and in maintaining a system of inspection by which any change which has occurred in the physical conditions surrounding the plant, poles, or lines of wire, which would tend to create or increase the danger to persons lawfully in pursuit of their business or pleasure, may be reasonably discovered. *Mitchell v. Charleston L. & P. Co.*, 6 Am. Electl. Cas. 245, 45 S. C. 146, 22 S. E. 767, 31 L. R. A. 577. Other courts announce the rule in even stronger terms. For instance, in Colorado it is said:

"Moreover, the court in other instructions correctly declared that the defendant was bound to exercise the highest skill, most consummate care and caution, and utmost diligence and foresight in the construction, maintenance, and timely inspection of its entire plant which was attainable, consistent with

the practical conduct of its business according to the best known methods of the state of its art at and prior to the time of the disaster." *Denver Con. Electric Co. v. Lawrence*, 8 Am. Electl. Cas. 617, 31 Colo. 301, 73 Pac. 39.

And in Pennsylvania the rule respecting the duty of a gas company is stated as follows:

"While no absolute standard of duty in dealing with such agencies can be prescribed, it is safe to say in general terms that every reasonable precaution suggested by experience and the known dangers of the subject ought to be taken. This would require, in the case of a gas company, not only that its pipes and fittings should be of such material and workmanship, and laid in the ground with such skill and care, as to provide against the escape of gas therefrom when new, but that such system of inspection should be maintained as would insure reasonable promptness in the detection of leaks that might occur from deterioration of the material of the pipes, or from any other cause within the circumspection of men of ordinary skill in business." *Koelsch v. Philadelphia Co.*, 152 Pa. 355, 25 Atl. 522, 18 L. R. A. 759, 34 Am. St. Rep. 653.

It would hardly do to say that the defendant can only be required to exercise due diligence after it receives notice of any defect in its appliances or of any change in the physical conditions surrounding them, for this would be placing a premium upon negligent ignorance, as was said, in substance, by the Supreme Court of South Carolina in *Mitchell v. Charleston L. & P. Co.*, above. *District of Columbia v. Woodbury*, 136 U. S. 463, 10 Sup. Ct. 990, 34 L. Ed. 472. Under the rule which we have announced above, we think the court's instructions No. 9 as modified, and No. 12 as given, correctly state the law.

2. The court also gave an instruction, numbered 5, of which complaint is made. That instruction is as follows:

"The court instructs the jury that all persons or corporations, who handle a force of great inherent danger to the lives and safety of others, are held by law to a high degree of care in handling the same, to the end that other persons shall not be hurt by the same, while such other persons are not trespassing and are rightfully minding their own business; in other words, the care required is measured by and equal to the danger. When any one handles a force of utmost danger, a very great care is required. What would be care in handling a force of little danger might not be care in handling a force of great danger, and might be negligence in handling such a force. As the danger increases, so the degree of care increases which is required of persons who are handling the force. The degree of care required is proportionate to the danger of the force, and, where a force of highest danger is handled, a very high degree of care is required in handling the said force, to the end that no other person lawfully minding his own business and not trespassing may be hurt by the force."

We think this instruction correctly states the law. In *Commonwealth Electric Co. v. Melville,* 9 Am. Electl. Cas. 95, 210 Ill. 70, 70 N. E. 1052, it is said:

"Electricity is a subtle and powerful agent. Ordinary care exercised by those who make a business of using it for profit, to prevent injury to others therefrom, requires much greater precaution in its use than where the element used is of a less dangerous character. As there is greater danger and hazard in the use of electricity, there must be a corresponding exercise of skill and attention for the purpose of avoiding injury to another, to constitute what the law terms 'ordinary care.' The care must be commensurate with the danger."

In *Hoye v. Chicago, M. & St. P. Ry. Co.,* 46 Minn. 269, 48 N. W. 1117, the Minnesota court states the rule as follows:

"Reasonable care is all that is required. But this must be proportionate to the risks to be apprehended and guarded against."

This language is quoted with approval by the same court in the later case of *Gilbert v. Duluth Gen. E. Co.,* 9 Am. Electl. Cas. 166, 100 N. W. 653.

The same rule in practically the same terms is announced by other courts and text-writers as follows:

"It would have been safer and the better practice to instruct the jury — which ought hereafter to be observed — even in cases like the one before us, that the defendant was bound to exercise that reasonable care and caution which would be exercised by a reasonably prudent and cautious person under the same or similar circumstances. In addition to this, the jury should have been instructed that the care increases as the danger does, and that, where the business in question is attended with great peril to the public, the care to be exercised by the person conducting the business is commensurate with the increased danger." *Denver Con. Electric Co. v. Simpson,* 5 Am. Electl. Cas. 278, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566. "An electric light company is bound as to the public to exercise the utmost degree of care in the construction, inspection, repair, and operation of its apparatus and appliances; or, disregarding distinctions as to degrees of care, the rule may be thus stated: To prevent an injury to the public, the law requires that usual and ordinary care should be used, which, in such a business as an electric light company operates, requires and demands a degree of care and diligence proportionate to the danger or mischief that is liable to ensue. The words 'usual and ordinary care' mean in such cases nothing more or less than that, if there be great danger and hazard in the business, there should be a corresponding degree of skill and attention required by the law." 10 Am. & Eng. Enc. of Law 872. "Electric companies are bound to use 'reasonable care in the construction and maintenance of their lines and apparatus — that is, such care as a reasonable man would use under the circumstances — and will be responsible for any conduct falling short of this standard.' This care varies with the danger which will be incurred by negligence. In cases where the wires carry a

strong and dangerous current of electricity, and the result of negligence might be exposure to death or most serious accidents, the highest degree of care is required." *City Electric St. Ry. Co. v. Conery*, 6 Am. Electl. Cas 217, 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262. "The measure or degree of care required of electrical companies is variously defined, but it is conceived that the consensus of opinion is that they must exercise that reasonable care, consistent with the practical operation of their business, which would be observed by reasonably prudent persons under like circumstances, increasing the care with any change in conditions likely to increase the danger, and having due regard to the existing state of science and of the art in question." 15 Cyc. 472.

Many of the cases growing out of alleged negligence by companies handling electricity are reviewed in Keasbey on Electric Wires, §§ 242–255, and the doctrine announced is that embodied in instruction No. 5. After all is said, the instruction only announced the familiar rule in negligence cases: That the defendant is required to exercise reasonable care. But what is reasonable care in handling brick and mortar may amount to criminal negligence in handling nitroglycerin; so that the only rational rule is that announced by the trial court: That the care required is measured by and equal to the danger.

3. By instruction No. 10 the court told the jury that there was not any evidence which would warrant the jury in finding that the defendants had actual notice of the erection of the trestle, and that their wires had been brought in close proximity to it; but that the jury should only consider this in the event that they believed from the evidence that the wire which caused the injury was hung before the trestle was erected; and in the event they believed from the evidence that the wire was strung after the trestle was erected, then the defendants were chargeable with knowledge of the existence of the trestle and the physical conditions surrounding it. If there was any error in this instruction, it was error in the defendants' favor.

4. Upon the trial the plaintiff offered testimony which tended to show that he had lived in Butte about seventeen or eighteen years; that he had worked in and about the mines and reduction works in Silver Bow, Deer Lodge, and Granite counties; that he had received from three to four dollars per day, according to the character of work he did; that among others he had worked for one D. H. Dunshee for six or seven years; that in 1901 he was at work in the Pennsylvania mine and worked there [illegible] out

a year. He was then asked what wages he received there. This question was objected to on the ground that the investigation should be limited to an inquiry as to the wages he was receiving at the time the accident occurred, and that the testimony was irrelevant, incompetent, and immaterial. The objection was overruled, and error is assigned to this ruling of the court. We think the objection was properly overruled. It might have occurred that at the time of the injury the plaintiff was not receiving any wages at all, and had not been for some time prior thereto, and, while it would have been competent for this fact to have been made to appear to the jury, it can hardly be said that an injured party under such circumstances would not be entitled to recover anything. Section 4330 of the Civil Code establishes the measure of damages in cases of this kind, as follows:

"For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

In a leading English case upon this subject it is held that, where recovery was sought by a physician for injuries which occasioned loss of time and which impaired his capacity to earn money in the future, the jury might consider proof of the average aggregate of yearly fees received by the physician before his injury. *Phillips v. London, etc., R. R. Co.*, L. R. 5 Q. B. 78, 42 L. T. N. S. 6; Patterson's Railway Accident Law, §§ 393–396. We do not think that the period of time covered by the inquiry in this instance was unreasonable.

5. In the specifications of errors in appellants' brief, under the head "Insufficiency of Evidence to Justify the Verdict," it is stated that the evidence is insufficient to justify a verdict for $20,000, the amount returned by the jury; but counsel apparently attached little importance to this contention, as their brief does not contain any argument whatever upon the subject. *Kennon v. Gilmer*, 9 Mont. 108, 22 Pac. 448, and *Hamilton v. Great Falls St. Ry. Co.*, 17 Mont. 334, 42 Pac. 860, 43 Pac. 713, are cited, but to what purpose is not just apparent. In each of these cases the verdict was apparently arbitrarily scaled. *Fulsom v. Concord*, 46 Vt. 135, and *Houston & T. C. R. Co. v. Willie*, 53 Tex. 318, 37 Am. Rep. 756, are the only other cases cited, and

these likewise, without any argument or comment whatever. In *Fulsome v. Concord* the trial court reminded the jury that an allowance for prospective damages is making payment in advance, and in fixing upon a sum for such damages this fact might be taken into consideration and the amount reduced to its present worth. On appeal the Supreme Court said of this: "As the effect of this suggestion would be to lessen the damages, if it had any effect, the defendant cannot complain of it, and we find no legal error in it. In respect to the amount of prospective damages to be awarded, the jury are the exclusive judges." In *Houston & T. C. R. Co. v. Willie* the Supreme Court of Texas said that compensation for lessened ability to earn money should be made upon the principle that the amount allowed is such as will purchase an annuity equal to the difference between the injured party's annual earnings before his injury, and the amount, if any, he might earn thereafter.

But if these cases are cited in support of some contention which appellants may make that the jury was improperly instructed upon the method to be employed in determining the amount of damages for impairment of earning capacity in the future, it is sufficient to say that a more definite instruction than that given by the court was not asked by them. The court instructed the jury that, if they found for the plaintiff, then in fixing the amount of damages they might take into consideration, mental and physical pain and suffering caused by the injury, wages which plaintiff might have earned from the date of the injury to the date of the trial, and, finally, if they found that the injuries are permanent, they might take into consideration any loss to him by reason of the impairment of his capacity to earn money in the future. No complaint is made of this instruction, and none could well be made. We are, however, of the opinion that an instruction particularly informing the jury of the plan or standard to be adopted in estimating damages for impairment of capacity to earn money in the future should be given in all such cases; but, if defendants desired a more specific instruction than that given, they should have asked for it. We think the rule announced by the Texas court, above, is the correct one, and in fact the only safe guide in fixing such damages. The question in a case of that kind is, what

amount will purchase an annuity equal to the difference between the annual wages or salary received by the plaintiff before and after the injury, where the injury is the proximate cause of the impairment of earning capacity? This rule is approved in *Baltimore & O. R. Co. v. Henthorne,* 73 Fed. 634, 19 C. C. A. 623; 4 Sutherland on Damages (3d ed.), § 1249.

The law does not contemplate that the injured party shall be paid in advance a sum, the interest from which will equal such amount, and at his death leave the principal to his estate, but only that he shall not be made to lose because of his injury. From standard mortuary tables and tables made use of by actuaries to determine the cost of a particular annuity, such damages may be ascertained and fixed with some degree of certainty. However, the elements of physical and mental pain and suffering are entirely uncertain, and no fixed standard can be established for ascertaining the damages occasioned by them. The amount must, of necessity, rest in the sound discretion of the jury, and courts are ever reluctant to interfere with the verdict upon the ground that it is excessive or insufficient. The parties are entitled to a verdict from the jury, and courts ought not to substitute their judgments for those of juries, except in those exceptional cases where it manifestly appears that the jurors made a mistake in calculation, considered an item or items of damages which should not have been considered, or abuse that sound discretion which by the law is vested in them. From the testimony given in this case the jury might property have drawn the conclusion that the plaintiff's earning capacity was totally destroyed by this accident, and that his mental faculties as well were greatly

We have considered the other assignments, but find no error. The judgment and order are affirmed.

Affirmed.

BRANTLY, C. J., and MILBURN, J., concur.

BECK ET AL. v. INDIANAPOLIS LIGHT & POWER CO.

Indiana Appellate Court, Second Division — Nov. 28, 1905.

36 Ind. App. 600, 76 N. E. 312.

1. CONTRACT FOR ELECTRICITY — LIQUIDATED DAMAGES. — A provision in a contract for electric current, that, "The undersigned applicant hereby agrees to use enough current, in case same is to be measured by the watt, to make a monthly bill of one dollar, or pay the amount of said bill should sufficient current be not used," is a part of the direct obligation of the contract, and cannot be construed as an agreement for liquidated damages.
2. SAME — INJUNCTION. — Where a contract for electric current provided that no electricity, other than that covered by the contract, should be used upon the said premises without the written consent of the company, an injunction was granted restraining the consumer from using current furnished by others, although equity would not compel specific performance of the contract.

Appeal by defendants from an order overruling a demurrer to the bill. *Affirmed.*

Means & Buenting, for appellants.

Scott & Scott, for appellee.

Opinion by COMSTOCK, J.:

The averments of the complaint show that appellee, Indianapolis Light & Power Company, and appellant, Merchants' Heat & Light Company, are corporations under the laws of Indiana, and severally engaged in the manufacture and production of electric current, and the distribution and sale of such currents for light, power, and other purposes, in the city of Indianapolis, and are competitors in said business; that in August, 1902, appellee and appellant Beck entered into a contract, in writing, by the terms of which appellee was to supply Beck, in the manner set forth in the contract, with electric current, upon the terms described in the contract, at a certain special price, to wit, seventy-five cents

per 1,000 watts, measured by watt meter, for a period of sixty months, the said Beck agreeing, during said period, to use enough current, measured by watt meter, to make a monthly bill of one dollar, or pay the amount of said bill, should sufficient current not be used for the service monthly, and that no electricity for light, heat, or power, other than that covered by the contract, should be used upon the said premises without the written consent of the appellee; that immediately, upon the execution of said contract, appellee's service wires were conducted into and upon appellant's said premises, and were connected with his wires and appliances for the distribution of current on said premises to points of consumption, and proper meter or meters of appellee were then placed and connected for recording and measuring the current, etc., and appellee began to furnish electric current under and pursuant to said contract, continued to do so until prevented by the wrongful acts of said Beck, and performed and continued to perform all the stipulations, terms, and conditions of said contract, and was at all times, and still is, able, ready, and willing and offering to perform, for the remaining portion of the period of the contract, as more fully set forth, all its stipulations, terms, and conditions. It is alleged that on the 9th of October, 1903, Beck notified appellee that he would discontinue to receive current from appellee, would disconnect the service wires, and would connect the service wires of said Merchants' Heat & Light Company with his own wires on said premises, and would thereafter receive electric current on his premises from said last-mentioned corporation; that upon the same day said Beck did disconnect appellee's service wires and connect the service wires of said other corporation, so that appellee could not deliver the electric current, etc.; that since said time said Beck has not received, and has refused to receive, electric current from appellee, and has received and accepted, and has threatened, and is threatening, to continue to receive, electric current from said other corporation, all of which is done, and is being done without the written consent of appellee, and contrary to the express provisions of said contract. Plaintiff avers further that, if said defendant is permitted to do and to continue to do the above-threatened and wrongful acts, great and irreparable injury will result therefrom to the plaintiff, and that the damages which will be sustained by the plaintiff, by

reason of said wrongful acts and breach of contract, cannot now or at any future period be accurately or even approximately measured, and an action for damages for a breach of said contract would not afford an adequate and complete remedy, because of the following facts: First. That this defendant uses a large amount of current. That the amount used by him varies from hour to hour, day to day, month to month, and year to year. That the amount of current which would be used by the defendant during the remainder of this period could not be ascertained by the appellee, except by the statement of others. The wrongful disconnecting of the plaintiff's service wires, as aforesaid, if permitted, would render it absolutely necessary for the plaintiff to ascertain the quantity of current required or used on said premises from the defendant himself by proceedings in the nature of discovery and accounting, but plaintiff in such proceedings would be compelled to rely upon the statements, accounts, measurements, and records kept by said defendant, and upon the readings and meter measurements made and kept by said defendant competing corporation, and would be compelled to rely upon the defendant keeping and preserving for the full period of said remaining contract term, full, true, and accurate account of measurements of the quantity of current used, and holding the same available for the use of the plaintiff, when needed for the purpose of proof. Second. That, even if the quantity of current which would be required and used by appellant could be ascertained, yet the profit appellee would make in selling the same to appellant could not be ascertained, and that any effort to show the same in a judicial proceeding would be "exceedingly complicated, burdensome, expensive, and inconvenient, and attended with great uncertainty as to correctness of results." Third. The plaintiff does not keep, and believes and avers it would be impracticable and impossible to keep, any system of accounts by which the cost to the defendant or the net profit to the plaintiff, at a fixed price upon an ascertained or determined quantity of electric current delivered by it to the defendant Beck, or which should be so delivered during the period of one or more years, could be ascertained or determined. Fourth. Because the cost of producing and delivering current during a specific period could not be ascertained, as this would require a balancing of defendant's accounts wi[illegible] [illegible] that

particular period. Fifth. Because the contract entered into with the defendant is one of about 200, long-time contracts of similar character heretofore entered into by and between the plaintiff and certain of its large consumers of electric current in the central business district of said city, and, in consideration of these contracts and to carry out their terms, this appellant has made large additional investments in machinery and other equipments necessary to carry on their business. Sixth. Electric current is a product of peculiar nature, which cannot be sold in said city or on any market at a fixed and common market price, such as wheat, corn, etc. The price of said electric current is fixed, from time to time, by contract with consumers. The electric current which said defendant Beck has so contracted to receive from the plaintiff, and for the furnishing of which the plaintiff has so invested his capital, and which said defendant is now refusing and threatening not to receive, plaintiff may not be able to sell to others during the period of said contract, and, if it should offer to sell the same for the same or greater rate than that fixed in said contract, such sale would probably not indemnify the plaintiff in its damages for the threatened breach of said contract.

The prayer is for injunction to prevent appellant from using, on the premises mentioned in the contract, electricity for light, heat, or power other than is furnished by appellee. To this complaint appellant Beck filed a demurrer for want of facts. The demurrer was overruled, and judgment entered on the demurrer, enjoining this appellant as prayed for in the complaint, and for costs. The only error assigned questions the sufficiency of the complaint to state a cause of action. It is contended, first, that

"The undersigned applicant hereby agrees to use enough current, in case same is to be measured by the watt, to make a monthly bill of one dollar, or pay the amount of said bill should sufficient current be not used."

This stipulation is a part of the direct obligation of the contract, and cannot be properly construed to be an agreement to pay damages for the breach thereof. In *Johnston et al v. Cowan,* 59 Pa. 275, Cowan, by writing, granted to Johnston and others, as partners, the privilege to take clay from his ground for twenty years, at twelve cents per ton, to pay $150 at the end of every six months, although they should not have then taken away so much clay as would amount to that sum. *Held,* that the writing was an agreement to pay for the privilege of taking clay, whether exercised or not, and that it was improper to call the fixed sums to be paid in the event of the minimum of clay not being taken liquidated damages.

"It is an alternative price to be paid in an event which it was foreseen might happen, not as damages, but in payment for the privilege. * * * We hold that the contract was not a mere license, but a grant of the right or privilege which the parties were bound to pay for, whether they enjoyed it or not. This was their contract and they must abide it."

Parties may, by agreement, fix upon a certain sum as liquidated damages, but, where the sum is so fixed, it must appear, either from the intent of the parties as expressed in the entire instrument or from expressed words that the sum was fixed as liquidated damages. The law ordinarily regards a general sum stated in a bond as a penalty, and will allow only a recovery of the damages actually sustained. *Dill et al. v. Lawrence,* 109 Ind. 564, 10 N. E. 573; *Muhlenberg v. Henning,* 116 Pa. 138, 9 Atl. 144; *Jaqua v. Headington,* 114 Ind. 309, 16 N. E. 527.

Third. The contract is not such a one that a court of equity can compel its specific performance, and for that reason it cannot enforce its terms by injunction. In *Xenia Real Estate Company et al. v. Macy,* 147 Ind. at page 574, 47 N. E. at page 149, the court say:

"To the doctrine that an injunction will not be allowed when the contract is not capable of an enforcement by specific performance there are exceptions. *Singer Manufacturing Co. v. Union Buttonhole, etc., Co.,* 6 Fish. Pat. Cas. 480, Holmes, 253, Fed. Cas. No. 12,904; *Chicago & A. Ry. Co. v. New York, etc., Co.* (C. C.) 24 Fed. 516; *People v. Manhattan Gas Light Co.,* 45 Barb. (N. Y.) 136; *Dietrichsen v. Cabburn,* 2 Ph. Ch. 52; *Hooper v. Brodrick,* 11

Sim. 47; 2 High on Injunctions, § 1109, on page 862; Fetter on Equity, p. 269, note 21, and § 189, pp. 294, 295, and cases cited in notes 22, 23; 2 Beach, Eq. Jur., § 767, and cases cited."

The case from which we have just quoted was one in which injunction was granted to prevent appellants from disconnecting appellee's electric light plant from a natural gas well, which, under the contract between the parties, was to furnish the supply of natural gas for the operation of the electric light plant, in which it was contended, as in the case at bar, that the contract was one which a court of equity could not enforce in a proceeding for specific performance, and for that reason it could not enforce its terms by injunction. In *Standard Fashion Co. v. Seigel-Cooper Co. et al.*, 157 N. Y. at page 60, 51 N. E. at page 410, 43 L. R. A. 854, 68 Am. St. Rep. 749, the court say:

"The complaint for specific performance, which sets forth a lawful contract between the parties, capable of performance by both, if no reason for nonperformance by either, readiness to perform on one side, a refusal to perform on the other, and facts showing no adequate remedy at law, is not demurrable on the ground that it does not state a cause of action, merely because it discloses a case which would justify a refusal by the court, in its sound discretion, to exercise its jurisdiction to grant a specific performance, for the reason that the nature of the subject-matter is so complicated as to require a multiplicity of orders by the court in its efforts to superintend the details of an extensive and peculiar business. Where a complaint stating a cause of action for specific performance of a contract for business dealings, between the plaintiff and the principal defendant, calling for varied and continuous acts, also seeks an injunction to restrain the breach of a negative and severable covenant through the transaction of the business by the principal defendant with a competitor of the plaintiff joined as a defendant and alleged to be knowingly promoting the breach, the case may properly be retained by the court as one permitting the exercise of the discretionary power of injunction, although a specific performance of the affirmative provisions of the contract would probably be impracticable through the difficulty of its enforcement." Affirmed in 30 App. Div. 564, 52 N. Y. Supp. 433.

In *Singer Sewing Machine Co. v. Union Buttonhole, etc., Co.*, Holmes, 253, Fed. Cas. No. 12,904, the English and American authorities are considered. There was a contract that the complainant was to be the sole and exclusive agent for the sale of machines made by the defendant company, and the defendant company was to furnish complainant with machines as called for up to the full capacity of the factory at a certain agreed price, to be paid monthly in cash. Defendant company neglected to deliver machines they requested. Contract provided that plaintiff should

not engage in selling any other buttonhole machines than those manufactured by defendant. In the opinion it is said:

"If the court cannot order a contract for the making of buttonhole machines, to be specifically performed, by reason of the impossibility of superintending the details of such a business, it does not follow that the bill may not be retained as an injunction bill. It was formerly thought that an injunction would not be granted to restrain the breach of any contract, unless the contract was of such a character that the court could fully enforce the performance of it on both sides."

After reviewing the earlier cases, the court continues:

"But all of these cases were overruled by one of the ablest chancellors who has adorned the woolsack, in *Lumley v. Wagner*, 1 De G., M. & G. 616. In that case a singer had agreed to sing at the plaintiff's theater for three months and not sing at any other, and the court enjoined her from performing at a rival establishment, though it was clear and was admitted that the court could not oblige her to sing for the plaintiff. This case was fully in accord with *Morris v. Coleman*, 18 Ves. 437, which had been disregarded or explained away in many of the intervening cases. It is now firmly established that the court will often interfere by injunction when it cannot decree performance."

The case further, in substance, holds that it appears that the negative remedy of injunction will do substantial justice between the parties by obliging the defendant, either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce specific performance. In the decree in the case at bar the court reserves to appellant the right to move to dissolve or modify the decree if circumstances shall require. In *Western Union Telegraph Company v. Rogers and Baltimore & Ohio Telegraph Co.*, 42 N. J. Eq. 311, 314, 11 Atl. 13, it is also held that a party will not be driven to his legal remedy where it may appear that that remedy will prove inadequate. The question in all cases is: "Whether the remedy is, under the circumstances of the case, full and complete."

Has appellee an edequate remedy at law? Appellee was engaged in the public service to supply electric current, and was under legal obligation to render any one situated on its line service upon application; the applicant conforming to its rules and regulations. Appellant Beck signed and presented the usual application for the service, which provided that the application should be subject to the conditions printed on the back thereof, and that the

written acceptance of the application by the light and power company, or its agents, should make the same a contract between the parties, including all rules and regulations printed or written therein. The contract was accepted by the light and power company. By its terms the company agreed to serve the applicant with electric current and the applicant agreed to receive the same from the company, on his terms, for the period of five years, and, in consideration of the long period of the contract, the price for the current to be a special price of 75 cents per 10,000 watts. The applicant " agrees to use enough current in case same is to be measured by watts meter, to make a monthly bill of one dollar or pay the amount of such bill, should sufficient current be not used. Said applicant further agrees that no electricity for light, heat or power other than that covered by this contract, shall be used upon his premises named herein, without the written consent of said light and power company indorsed hereon." The contract does not stipulate that the company is to furnish any specific quantity of current, nor that the applicant shall take any specific quantity of current. It does stipulate that the applicant will use enough current to make a monthly bill of one dollar, or pay the amount of said bill, should sufficient current to make a bill of that amount be not used. By negative averment the applicant agrees that no electricity for light, heat, or power, other than that covered by this contract, shall be used in his premises, without the written consent of the company indorsed on said contract. Without reciting specific facts averred in the complaint, we think they show that the damages for the threatened and continuing breach of the contract cannot be accurately or even approximately measured or ascertained, and that an action for damages for a breach of said contract would not afford an adequate and complete remedy, unless the stipulation that the applicant will use enough current to make a monthly bill of one dollar, or pay the amount of such bill, if sufficient current to make a bill of that amount be not used, can be held as a stipulation in the contract fixing the damage to be paid for a breach thereof. We cannot admit that this stipulation is sufficient to fix the amount of damages. In *Metropolitan Electric Supply Co. v. Ginder,* 70 Law Journal, Chancery Division, 862, the facts are as follows:

" The defendant, Thomas Ginder, was a publican carrying on business in a public house in Holborn. On November 16, 1898, he signed what was called

in the proceedings, a contract, but which in point of fact was a request delivered to the plaintiffs under the statutory rights conferred by the acts of Parliament, requesting a supply of energy to his premises. This request was made subject, among other terms and conditions, to the following: '(1) The consumer agrees to take the whole of the electric energy required for the premises mentioned below from the company for a period of not less than five years.' (2) 'The charge for electric energy to be 4½*d.* per Board of Trade unit.' On the margin it was noted that, in the event of the plaintiff company's standard rate being reduced below the price therein quoted, the defendant was to have the benefit of such reduction. The result of the request was that, the plaintiff being by statute compellable to supply directly the request was made, there arose a right in the defendant to have a supply, and accordingly a supply was given him by the plaintiff company. On February 25, 1901, the defendant wrote to the plaintiff company, stating that, as he was dissatisfied with its light, he had instructed another company to fix up its light and was now using it, and requesting plaintiff company to remove its meter. Thereupon the defendant abandoned the plaintiff company and took his supply from another company."

The company prayed for a writ of injunction to restrain the defendant from taking any electric energy from any person other than the company. It was held that the contract implied a contract by the defendant not to take energy from any one except the company, which in a case of this kind, a trade contract for supply, and not for personal services, could be enforced by injunction, and the injunction was accordingly granted. In the course of the opinion it is stated:

"The consumer agrees to take the whole of the electric energy required for his premises from the plaintiff company. The company was bound to supply under the statute, if asked. The consumer asks. The result was, of course, that there was a right in the consumer to be supplied. The only question for bargain, then, was price, and that was fixed at 4½*d.* per unit. What were the parties really contracting about in those words? They were contracting, not affirmatively for the supply of something, but negatively that the defendant would not take from somebody else. There is no affirmative contract here to take at all. The defendant does not agree that he will take any energy from the plaintiff company. He says he will take the whole of the electric energy required. It is competent to him to burn gas, if he likes, and to require none. The only thing he was contracting about was that, if he took electric energy, he would take it from the plaintiff company. It seems to me that the whole essence of that contract is that which is not expressed in words 'I agree,' but which by implication is really the only thing existing, a contract that he will not take from somebody else. He agrees to take the whole from A., which necessarily implies that he will not take from B. As a matter of construction, therefore, not by express words, but by necessary implication, I think that there is here an agreement not to take from others."

The court then proceeds to consider the authorities relative to the enforcement of negative covenants, implied or expressed, points out the distinction between the class of contracts relating to personal services and those which were made to trade supplies and the effect of negative words in both classes of contracts, and then proceeds:

"Now, I think this is such a contract [one the subject of equitable jurisdiction] because it appears to me that the contract for this present purpose is not one for the supply by the plaintiff company to the defendant of electricity. He is not bound to take any. The contract really is a contract, the whole of which is, in substance, the negative part of it, that he will take the whole from them, and will not take it from anybody else. I therefore think that the fact that the contract is affirmative, and not negative, in form is no ground for refusing an injunction. * * * It seems to me that this is a contract which it is competent for the plaintiff company to make, and that it is entitled to succeed in the action. I must therefore grant an injunction to restrain the defendant during the residue of the term of five years, which is mentioned in the contract of November 16, 1898, from taking the electric energy required for his premises from any person other than the plaintiff company," etc.

The difference in the case at bar and the case we have just referred to is that in the latter case the negative covenant is implied and in the former it is expressed. It appears from the English case, and the cases therein referred to, that the case at bar is of equitable cognizance, and that the proper remedy for a continuing breach of the contract is an injunction. The American authorities recognized the equitable jurisdiction for the specific enforcement of trade contracts by injunction, where an action for damages will not afford as complete and adequate a remedy as that of injunction. In *Xenia Real Estate Co. v. Macy, supra,* the court held that the appellee, under the facts alleged in the complaint, was entitled to injunctive relief, saying:

"If, from the facts alleged in the complaint, it is apparent that the appellee had no other complete or adequate remedy, the same was sufficient to entitle him to an injunction."

In the course of the opinion the court say:

"It is not necessary in an application for injunction, as insisted by appellant, to aver and prove that the plaintiff will suffer irreparable injury if the relief by injunction is not granted. All that is necessary is to aver that plaintiff will suffer great injury." Section 1162, Burns' Ann. St. 1894; section 1148, Rev. St. 1881.

Among other cases cited in *Xenia Real Estate Co. et al. v. Macy, supra,* is *Whitman v. Fayette Fuel Gas Co.,* 139 Pa. 492, 20 Atl.

1062, in which a contract between a natural gas company and the owners of a glass works provided that the former should supply gas for fuel to the latter "for all purposes connected with the manufacture of the wares aforesaid. * * * So long as natural gas may continue to be produced from the territory now or hereafter owned or operated by the said Fayette Fuel Gas Company, its successors, or assigns." On a bill averring that, relying on the contract, plaintiff's works had been constructed for the use of natural gas only as fuel, and that the company had shut off the entire supply while the works were in operation, endangering loss incapable of accurate adjustment. It was held that a preliminary injunction mandatory to the extent of restoring the *statu quo* should issue.

In *Simpson v. Pittsburgh Plate Glass Company,* 28 Ind. App. 343, 62 N. E. 753, it was held that where, by the terms of a natural gas lease, the lessee, as a part consideration for the execution of the lease, agreed to furnish gas to lessor for domestic use during the continuance of the lease, injunction will lie to restrain the lessee from cutting off the supply of gas. The court (on page 354 of 28 Ind. App., page 758 of 62 N. E.) states the ground for injunctive relief in such case as follows:

"The application for injunction cannot be said to be an appeal to equity for the enforcing of performance of a corporate duty of such or of a duty of public nature, yet the appellant, upon the facts stated in the complaint, will suffer great injury by the cutting off of the supply of gas for domestic use, and he has not a remedy by a single action at law, plain and adequate, and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. This is sufficient to entitle him to an injunction. *Xenia, etc., Co. v. Macy,* 147 Ind. 568, 47 N. E. 147."

In *Ferris v. American Brewing Co.,* 155 Ind. 539, 58 N. E. 701, the court held that, where a covenant was inserted in a lease prohibiting the lessee from selling beer upon the leased premises other than that manufactured by a certain brewing company, the company for whose benefit the contract was made may enforce such provision by injunction; the remedy at law being inadequate. In the course of the opinion it is said:

"It is said in Greenhood on Pub. Pol., p. 677: 'Rule 560. A contract which secures to the obligee the exclusive custom of the party contracting, especially when by such contract the party making it procures an advantage not otherwise obtainable, is valid although the covenantor be engaged in public business, unless its enforcement would be prejudicial to the public.' Among

the illustrations given by the author are the following: 'A publican, in making settlement with his creditors, agrees to buy all his beer of them. The agreement is valid.' 'A. contracts to furnish B. with sewing machines at a discount, and upon credit, provided B. will deal exclusively with him. The contract of B. is valid.' 'A. agrees to buy of B. all the groceries he may need, provided he will furnish them at as low a price as others. The agreement is valid.' 'A. covenants not to buy any meat for his trade for six months, of any one but the covenantee. The agreement is valid.' 'These contracts are upheld because they in no wise tend to diminish trade. A man is at liberty to buy of one entirely, if he chooses, and if he concludes to purchase entirely of him, he alone, and not the public is injured.' * * * Moreover, it is a general rule that where one has made a valid contract that he will not engage in a certain business or occupation, and it is shown that the said contract is being violated, to the injury of one entitled to enforce the same, he is entitled to an injunction against the offending party. This is upon the ground that, from the nature of the case, just and adequate damages cannot be estimated for a breach of the contract. In other words, the remedy at law is inadequate. *O'Neal v. Hines*, 145 Ind. 32, 35, 43 N. E. 940, and cases cited; 1 High on Injunctions, § 1142. The rule stated clearly applies to this case."

Appellant strongly relies upon *Steinau v. Cincinnati Gas Light & Coke Co.* (Ohio), 27 N E. 545, a case like the one at bar in some of its features. The action was to obtain an injunction, and a demurrer to the complaint was overruled, and upon appeal the judgment was reversed. In conclusion the court said:

"But a decision of this question is not necessary to the disposition of the case at bar, and that, as well as whether a court of equity should in any case, where full performance cannot be enforced, decree performance of negative covenants of one party can properly be left to be determined, when a case arises which necessarily requires a decision upon them. We are content to rest the decision of this case upon the ground that the remedy of the defendant in error is at law, and not in equity."

The facts in the two cases may be distinguished, as may be the case of the *Dewey Hotel Company v. U. S. Electric Light Company,* 17 App. D. C. 356, and many other cases cited by appellant upon this branch of the case. There is a conflict in the decisions upon the question of granting an injunction, when the granting of the injunction will be to effect specific performance of affirmative covenants, unless the affirmative stipulations of the complaining party can be specifically enforced against him, but the Indiana cases favor the granting of the writ.

"The granting or reversal of an injunction rests in the sound discretion of a court of equity, and ought not as a general rule to be granted when under the circumstances it would be against good conscience, or productive of great hardship." *Loy v. Madison, etc., Gas Co.*, 156 Ind. 338, 58 N. E. 844.

From the averments of the complaint it is apparent that an injunction will do substantial justice between the parties. It is not against good conscience to restrain conduct which is contrary to the contract. The law favors the performance of valid contracts, and, even if in a given case it might appear that the trial court was justified in the exercise of a sound discretion in the refusal of the writ of injunction, the facts in this case certainly do not justify an appellate court in setting aside the writ, where such sound discretion has been exercised in the issuing of the writ.

The appellant Merchants' Heat & Light Co. has not joined in the assignment of error and has not filed a brief. The court did not err in overruling the demurrer to the complaint.

Judgment affirmed.

FIREBAUGH v. SEATTLE ELECTRIC CO.

Washington Supreme Court — Dec. 11, 1905.

4 St. Ry. Rep. 1055, 40 Wash. 658, 82 Pac. 995.

1. INJURY TO PASSENGER CAUSED BY BLOWING OUT OF CONTROLLER OF CAR — RES IPSA LOQUITUR — DEFECTIVE APPLIANCES UNDER CONTROL OF CARRIER. — Where plaintiff was injured in jumping from a street car, on which he was a passenger, because of the blowing out of the controller, over which the company had entire control, and there was no contention that there was contributory negligence on the part of the passenger, it was not error for the court to charge that the happening of the accident raised a presumption of negligence on the part of the company.
2. SAME — EFFECT OF JUMPING FROM CAR IN FEAR OF IMPENDING DANGER. — When the evidence shows that such passenger was warranted in retreating from the peril which threatened him, and that, in fact, he would have been guilty of contributory negligence if he had not attempted to save himself by retreating, he is not deprived from pleading negligence on the part of the carrier.
3. SAME — WHEN QUESTION OF REBUTTAL OF PRESUMPTION OF NEGLIGENCE FOR THE JURY. — Where, in such action, it was shown by the witnesses who testified that they did not know the cause of the blow-out, and that sometimes a blow-out would occur and the cause could not be ascertained, and plaintiff offered testimony showing different causes for the explosion,

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Injuries to Passengers. — See note to *Patterson v. San Francisco & S. M. Electric Ry. Co., ante.* As to acts of passengers in emergencies, see note to *Chicago Union Traction Co. v. Newmiller*, 4 St. Ry. Rep. 165. As to explosion in car, see note in 4 St. Ry. Rep. 44, and 3 St. Ry. Rep. 928–931.

which might have been controlled and remedied by the defendant, it was a question for the jury to determine whether the defendant rebutted the presumption of its negligence which, under the law, arose by the happening of the accident.

Appeal by defendant from judgment for plaintiff. *Affirmed.*

Hughes, McMicken, Dovell & Ramsey, for appellant.

Brady & Gay, for respondent.

Opinion by DUNBAR, J.:

The action was brought by the respondent, to recover damages for personal injuries sustained by jumping from a front platform of a street car operated by the appellant company, and on which he was a passenger. The complaint alleges, among other things, that the defendant carelessly and negligently used the said car when it was out of repair in its motor power and in its appliances appertaining thereto; that while the plaintiff was such passenger on said car, by reason of defendant's negligence, the controller, machinery, and appliances of said car exploded, and filled the vestibule thereof with smoke and flames to such an extent that all the front portions of said car became greatly heated; that by reason thereof the plaintiff was placed in a situation of apparent and imminent peril, and was dominated by the peril of impending danger, and believed that the only way he could save himself was to jump from said car, and without time to deliberate, and acting on the instinct of self-preservation, did jump and was thrown against hard substances beside the track, and thereby injured. The defendant, in its answer, admitted that the plaintiff was a passenger, and that he did jump from the car at the time

defect of the controller or other appliances of the car, or means used by the company in the operation of the car, and in such a case it devolves upon the company to show that such burning or blowing out did not result from any cause which the highest degree of care on its part could have prevented."

Assignment 2 is that the court erred in denying defendant's challenge to the legal sufficiency of the evidence, and in refusing to instruct the jury to return a verdict for the defendant. The allegation of contributory negligence raised in the answer is not urged here.

It is contended by the learned counsel for appellant that the doctrine of "*res ipsa loquitur*" does not apply in a case of this kind, and that it was improper in this case to tell the jury that they were entitled to find the appellant negligent upon proof of the accident alone; and the case of *Allen v. Northern Pacific Ry. Co.*, 35 Wash. 221, 77 Pac. 204, 66 L. R. A. 804, is cited in support of the contention that the doctrine of "*res ipsa loquitur*" has been somewhat modified by this court. It is insisted by the appellant that it is manifest that this court has not intended to announce the rule that there is a presumption of negligence unless it is apparent that the accident could not have happened without negligence on the part of the carrier. This is no doubt true, for the rule of "*res ipsa loquitur*" is based upon the apparent fact that the accident could not have happened without negligence on the part of the carrier, or upon the literal meaning of the expression that the thing itself speaks, and shows *prima facie* that the carrier was negligent. The cases which we will hereafter cite do not in any way contradict the further contention of the appellant that a careful analysis of the better considered decisions shows that negligence will not be presumed from the mere fact of accident which is as consistent with the presumption that it was unavoidable as it is with negligence; and, therefore, if it be left in doubt what the cause of the accident was, or if it may as well be attributable to the act of God or unknown causes as to negligence, there is no such presumption. As we have said, this does not affect the principle of law that, when, by reason of the machinery and appliances used by the common carrier wholly under its control, a passenger is injured, this fact shows *prima facie* negligence on the part of the carrier.

Looking to eminent authority for expression on this subject,

we find the following announcement in Nellis on Street Railroad Accident Law, pp. 590, 591:

"Where the plaintiff is a passenger on a street car, a *prima facie* case of negligence is made out by showing the happening of the accident during the course of transportation; and, if the injury was caused by apparatus wholly under its control, furnished and applied by it, a presumption of negligence on the part of the company is raised, and the burden is on the latter to prove itself not guilty of negligence."

The same rule is substantially laid down by Shearman & Redfield on the Law of Negligence, and by all other authority. In *Gleeson v. Virginia Midland R. R. Co.*, 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458, which was an action for damages caused by a landslide in a railway cut the doctrine of "*res ipsa loquitur*" was applied, and the court announced the rule as follows:

"Since the decisions of *Stokes v. Salstonstall*, 13 Pet. 181, 10 L. Ed. 115, and *New Jersey R. & Trans. Co. v. Pollard*, 22 Wall. 341, 22 L. Ed. 877, it has been settled law in this court that the happening of an injurious accident is, in passenger cases, *prima facie* evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care) the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases has received general acceptance, and was followed at the present term in *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270."

In answer to the contention of the carrier in that case, to the effect that the operation of the rule was confined to cases where the accident resulted from defective arrangement, management, or misconstruction of things over which the defendant had immediate control, etc., the court said:

"Neither of these attempted distinctions is sound, since, as has been shown, the defect was in the construction of that over which the defendant did have control and for which it was responsible, and since the slide was not caused by the act of God, in any admissible sense of that phrase. Moreover, if these distinctions were sound, still, as a matter of correct practice, the modification should have been made. The law is that the plaintiff must show negligence in the defendant. This is done *prima facie* by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility, or of the act of God, it is still none the less true that the plaintiff has made out his *prima facie* case. When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of the exculpation, whether disclosed by one party or the other. They are its matter of defense."

So that it will be seen that the court in that case went further than it is necessary to go here, because the fact is undisputed in

this case that the accident was caused by appliances over which the appellant had absolute control.

This broad announcement, however, has been somewhat modified by this court in *Hawkins v. Front Street Cable Ry. Co.*, 3 Wash. St. 592, 28 Pac. 1021, 16 L. R. A. 808, 28 Am. St. Rep. 72, where it was held that the statement that, where a passenger was being carried on a train and was injured without fault of his own, there was legal presumption of negligence, casting upon the carrier the burden of disproving it, was too broad. But that was upon the express ground that the nature of the accident was not such as to warrant saying anything about the machinery; the case being an accident caused to the passenger while occupying a seat upon the dummy car of a cable railway, by reason of a collision between the dummy and a wagon which was on the track. But the rule announced in *Federal Street, etc., Ry. Co. v. Gibson*, 96 Pa. 83, was indorsed in that case, as being the proper rule, and there it was said:

"It is true, in many cases, the mere fact of injury to a passenger raises the presumption of want of care on the part of the railroad company. Such is the case when the injury results from defective track, cars, machinery, or motive power."

The whole case conclusively shows that there was no attempt to disturb the well-settled rule that, where the accident was caused by machinery or equipment over which the carrier had absolute control, the presumption of negligence on the part of the carrier would attach. And no further modification was intended by this court in *Allen v. Northern Pacific Ry. Co., supra.* The court there quoted approvingly from Elliott on Railroads, section 1644, which is as follows:

"It is, therefore, too broad a statement of the rule to say that in all cases a presumption of negligence on the part of the carrier arises from the mere happening of the accident or an injury to a passenger, regardless of the circumstances and nature of the accident. The true rule would seem to be that, when the injury and circumstances attending it are so unusual and of such a nature that it could not well have happened without the company being negligent, or when it is caused by something connected with the equipment or operation of the road over which the company has entire control, without contributory negligence on the part of the passenger, a presumption of negligence on the part of the company usually arises from proof of such facts, in the absence of anything to the contrary, and the burden is then cast upon the company to show that its negligence did not cause the injury."

written acceptance of the application by the light and power company, or its agents, should make the same a contract between the parties, including all rules and regulations printed or written therein. The contract was accepted by the light and power company. By its terms the company agreed to serve the applicant with electric current and the applicant agreed to receive the same from the company, on his terms, for the period of five years, and, in consideration of the long period of the contract, the price for the current to be a special price of 75 cents per 10,000 watts. The applicant " agrees to use enough current in case same is to be measured by watts meter, to make a monthly bill of one dollar or pay the amount of such bill, should sufficient current be not used. Said applicant further agrees that no electricity for light, heat or power other than that covered by this contract, shall be used upon his premises named herein, without the written consent of said light and power company indorsed hereon." The contract does not stipulate that the company is to furnish any specific quantity of current, nor that the applicant shall take any specific quantity of current. It does stipulate that the applicant will use enough current to make a monthly bill of one dollar, or pay the amount of said bill, should sufficient current to make a bill of that amount be not used. By negative averment the applicant agrees that no electricity for light, heat, or power, other than that covered by this contract, shall be used in his premises, without the written consent of the company indorsed on said contract. Without reciting specific facts averred in the complaint, we think they show

rule it should apply, it cannot apply under the circumstances of this case, because the respondent was not relying upon the operation of the car by the appellant, and was, therefore, not a passive recipient; and the presumption of negligence could not obtain because he acted himself and to a certain extent took the matter into his own hands by jumping from the car; and some cases are cited in support of this contention. We think, upon an examination of the cases, that they do not in any manner sustain appellant's contention; and that, when it is conceded, as it must be from an examination of the testimony in this case, that the plaintiff was warranted in retreating from the peril which threatened him, and when in fact he would have been guilty of contributory negligence if he had not attempted to save himself by retreating, there is no equitable rule which could deprive him, by reason of such cautionary action on his part, from pleading negligence on the part of the carrier.

It is further earnestly contended by the appellant that, in any event, it was shown by the appellant that there was no negligence on the part of the carrier, and that the court should have sustained the challenge as to the legal sufficiency of the evidence. An examination of this testimony satisfies us that it was not proven that the cause of the blow-out of the controller was beyond appellant's control. It was simply shown by the witnesses who testified that they did not know what the cause was, and that sometimes a blow-out would occur and the cause could not be ascertained. But, outside of this, there was testimony offered by the respondent showing different causes for the explosion which might have been controlled and remedied by the appellant, and under the testimony it was a question for the jury to determine whether the appellant rebutted the presumption of negligence which, under the law, attached to it by reason of the accident occurring.

This question having been submitted to the jury under proper instructions, we are unable to find any error in the record, and the judgment is affirmed.

MOUNT, C. J., and RUDKIN, FULLERTON, HADLEY, CROW, and ROOT, JJ., concur.

OWEN v. PORTAGE TELEPHONE CO.

Wisconsin Supreme Court — Dec. 12, 1905.

126 Wis. 412, 105 N. W. 924.

1. INJURY FROM TELEPHONE WIRE — LIGHTNING — EVIDENCE — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. — In an action against a telephone company for personal injuries it appeared that the defendant had installed a telephone on the plaintiff's premises, that a ground wire which had been connected with a pump had been disconnected, and was hung by the plaintiff inside the pumphouse, near a looking glass; that plaintiff while combing his hair in front of this glass, using a metallic comb, received a shock apparently from the end of this wire, that this happened during an electrical storm. *Held*, that under the evidence it was a question for the jury whether it was not negligence in the plaintiff to permit such a condition to exist, and to expose himself to the peril thereof.
2. SAME — INSTRUCTIONS. — In an action for personal injuries caused by a shock from lightning following a telephone wire into a building, an instruction that, "It is a matter of common knowledge with all men that lightning is conducted along such wires as that which ran to the 'phone and to the pumphouse," was proper.
3. SAME — KNOWLEDGE OF DANGER. — An instruction that the jury should consider whether "the plaintiff knew or ought to have known and comprehended the risk and dangers," is not objectionable when taken in connection with the remainder of the charge, in which the jury were correctly informed that plaintiff ought to know and appreciate those things which a man of ordinary care and prudence would know and appreciate under like circumstances.
4. SAME — COMPARATIVE OR SUPERVENING NEGLIGENCE. — It was proper to refuse to instruct the jury that, even if plaintiff were guilty of negligence in coiling the wire and hanging it in a place dangerous to those using the looking glass, still the defendant would be liable if, after knowledge of such negligence, it might, by the exercise of ordinary care, have averted the injury. Comparative or supervening negligence has no place in the jurisprudence of this State.

Appeal by plaintiff from a judgment for defendant. *Affirmed.*

Statement of facts by DODGE, J.:

Plaintiff was manager and in possession of a farm near the city of Portage, in which the defendant had, at his request, installed a telephone, the ground connection of which originally was a three-foot rod of iron driven into the ground, which proved inadequate in the winters of 1898 and 1899, whereupon the defendant, at plaintiff's request and with his knowledge, connected with the ground wire another wire, passing over a shed roof and into a pumphouse, and thence to the floor, and fastened around an iron pump. In the following spring a longer iron rod or pipe was substituted for the first one, and the ground wire of the telephone connected with that, thus leaving the telephone supplied with two ground connections. Some time in 1899 or 1900, the wire

in the pumphouse became disconnected from the pump by no act of defendant, and for two or three years the disconnected end hung there in close proximity to the pump, and was used by the plaintiff to hang a key on. Some time in the spring of 1903, probably in March, the plaintiff, or some of his household, coiled up the dangling end of this wire and hung it upon a nail inside of the pumphouse, upon which hung a small looking glass used by members of the family for toilet purposes, of which plaintiff had full knowledge. Meanwhile plaintiff had no knewledge or information that this wire had ever been disconnected from the telephone ground wire or that it had not. On May 26, 1903, in the midst of a violent electric storm, plaintiff, after ablutions, stepped in front of this glass to comb his hair, using for that purpose a metallic comb. His face was but a few inches from the coil of wire hanging on the nail. Suddenly there was a flash of lightning, apparently from the end of this wire, which struck plaintiff's face, rendering him unconscious, and causing serious injury. There was also evidence that about the same moment lightning struck a telephone pole not very far from the house, and signs of scorching near the telephone and at the end of this wire were discovered, claimed to indicate that the lightning, striking the pole, had been conducted through the telephone wire into the house, and thence through the wire into the pumphouse. This action was brought to recover plaintiff's damage. The jury found by a special verdict (1) that plaintiff's injury resulted from this wire; (2) that the defendant was not guilty of negligence in not disconnecting the pumphouse wire from the ground wire; (3) that the defendant was negligent in leaving the wire disconnected from the pump; (4) that such negligence was the proximate cause of the injury; (6) that there was "want of ordinary care on the part of the plaintiff, which contributed to the injury;" and (7) damages $1,000. Plaintiff moved to reverse the answer to the sixth question and enter judgment in his favor on such amended verdict, and, failing such relief, that the verdict be set aside and new trial granted. Such motions were overruled, and judgment rendered for defendant on the verdict, from which plaintiff appeals.

Fowler & McNamara, C. C. Wayland, C. A. Fowler, and *Burr W. Jones,* for appellant.

Daniel H. Grady, for respondent.

Opinion by DODGE, J.:

1. We agree with the trial court that there was evidence upon which the jury might have based their conclusion of plaintiff's contributory negligence in hanging or permitting to be hung on his premises the roll of wire in immediate proximity to the place where he and others were likely to stand in front of the looking glass, and in taking his place near the same at a moment of violent electrical disturbance. The principal insistance of appellant against the sufficiency of such evidence is based upon the assertion that appellant had no knowledge that the wire in the pumphouse had not been disconnected from the ground wire

of the telephone. We cannot think this sufficient. He knew that, when originally put in place and carried into the pumphouse, it had been so connected with the ground wire, and he offered no evidence of any knowledge or investigation on his part as to whether it had been disconnected. We think it within the province of the jury to consider whether it was not negligence in one to permit such a condition to exist on his own premises without even investigation and to expose himself to the peril thereof.

2. Error is assigned upon a ruling excluding an offer of proof that the iron stake or rod, to which the main ground wire from plaintiff's telephone was attached, was not an approved device, being rusty and not galvanized, so that, as argued, it failed of its full duty in conducting electricity to the ground, and at least enhanced the likelihood of lightning passing through the pumphouse wire. The objection and ruling were based upon the contention that the notice of injury failed to describe any such defect or negligence among the grounds upon which plaintiff's claim was made in accord with section 4222, Rev. St. 1898. We shall not deem necessary to decide how fully or specifically that notice must describe the negligence of defendant upon which a plaintiff grounds his claim, nor whether, by reasonable interpretation, the notice here may be held to point out this defect; for, if it be conceded that this evidence offered was admissible as tending to prove defendant's negligence, its exclusion could not have had any prejudicial effect upon that issue, because the jury found defendant negligent. An error which does not affect a substantial right cannot justify a reversal. Section 2829, Rev. St. 1898. But, says appellant, even if not admissible to prove defendant's negligence, such evidence did tend to rebut contributory negligence on plaintiff's part, if, as he claims, he had no knowledge of the defects in the ground connection, nor, therefore, of enhanced peril from the pumphouse wire. The offer of evidence was, obviously, not understood by either party or the court to be in support of any such issue; hence it cannot, in fairness to the trial court, be said that any ruling was made on that subject, so as to be a legitimate ground upon which to assign error. Waiving that consideration, however, could error be predicated upon exclusion of evidence in denial of plaintiff's negligence at that stage of the trial? At the time of the offer there had been no

evidence drawn out which could support an imputation of negligence of plaintiff. He and another witness had merely given the barest outline of the catastrophe, and he had been withdrawn from the stand, apparently to make place for some medical witnesses, when the witness Burton was called to give descriptions of the telephone and the various wires as he observed them immediately after the injury. Contributory negligence is purely and strictly defensive in Wisconsin. As said in one of the cases cited, it is like the defense of payment. *Randall v. Northwestern Telegraph Co.*, 54 Wis. 140, 147, 11 N. W. 419, 41 Am. Rep. 17; *Hoye v. C. & N. W. Ry. Co.*, 67 Wis. 1, 15, 29 N. W. 646; *Gill v. Homrighausen*, 79 Wis. 634, 48 N. W. 862. Evidence in support thereof is defensive merely, and such affirmative evidence cannot regularly be introduced until plaintiff's case is closed; nor, in the proper order of trial, should evidence in denial thereof be received until defendant rests his case. Of course, in practice, it often happens that plaintiff and his witnesses, in narrating the transaction surrounding an injury, cannot avoid, either on direct or cross-examination, describing his conduct, and thus furnishing proof of the defense of which defendant can avail himself, and it might then be proper to permit plaintiff to introduce explanatory evidence to avert the result of motion for new suit. Even in that case the evidence would, strictly, be out of order, and admissible only in discretion. We surely could not hold it abuse of discretion to refuse to receive evidence to rebut contributory negligence before any had appeared in support of that issue. Such would be the situation here, if the evidence had been offered expressly to disprove contributory negligence, and no error would exist in its exclusion.

3. Error is assigned because the court told the jury, apropos of the plaintiff's contributory negligence: "It is matter of common knowledge with all men that lightning is conducted along such wires as that which ran to the phone and to the pumphouse." We think the court was entirely correct. We suppose it to be common knowledge that a copper wire is a better conductor of electricity than most other things, and that any wire having contact with the outside of buildings is liable to become charged with electricity seeking way from the atmosphere to the ground, especially in times of electrical disturbance. We discover no error in this instruction.

Complaint is made of instruction upon the same issue, that the jury should consider whether "the plaintiff knew or ought to have known and comprehended the risk and dangers." The excepted portion of the instruction, standing alone, might be objectionable upon the grounds discussed in *Dehsoy v. M. E. Ry. & L. Co.*, 110 Wis. 412, 416, 85 N. W. 973, as allowing the jury to set up for themselves an ideal of that which the plaintiff ought to have known; but this is a portion of a general charge, in which the jury were correctly informed that plaintiff ought to know and appreciate those things which a man of ordinary care and prudence would know and appreciate under like circumstances. Thus qualified, we can discover nothing of error in the instruction.

The charge on the subject of contributory negligence is further complained of generally, because it did not in terms inform the jury that negligence on plaintiff's part which directly contributed to the injury must have been the proximate cause thereof, with a statement of all the elements pertaining to proximate cause. We do not think it obnoxious to this objection. It required for an affirmative answer that his negligence, if any, must have "directly contributed" to his injury; but the rest of the same sentence required also that the injury must have been the natural and probable result, and that the situation must have been such that an ordinarily prudent person would have anticipated and appreciated the danger of such an accident. This instruction was at least favorable enough to the appellant. If not necessary that his negligence should have contributed "directly," that re-

Co., 119 Wis. 650, 97 N. W. 563, where it is said of plaintiff's negligence: "It need not be the sole cause, and it may contribute but slightly." However, there is no necessary inconsistency between the two findings. To the finding of proximate causation by defendant's negligence, it is but necessary that the probability of some injury be within reasonable anticipation; not the particular injury; not even an injury to the particular person. *Mauch v. Hartford*, 112 Wis. 42, 87 N. W. 816; *Meyer v. Milwaukee E. R. & L. Co.*, 116 Wis. 336, 340, 93 N. W. 6. Now the jury might well have believed that just such an injury as this was to be reasonably anticipated to some person having no knowledge of the danger, and therefore guilty of no negligence in exposing himself to it, and thus have properly found complete proximate causal connection with any injury actually resulting; but the fact that the person who happened to receive the injury had such knowledge of the peril as to render him negligent in the exposure to it would not derogate in any degree from that finding, although it might justify a conclusion of contributory negligence on his part. Of course, the conduct of a plaintiff which brings on the injury may have been so extraordinary and unusual as to tend to the conclusion that no injury was probable enough to be anticipated by any one, and such conduct is provable under the general issue, not because it is contributory negligence, but because, as part of the alleged chain of events, it interrupts the natural and probable causal connection between defendant's negligence and the injury suffered. *Jones v. S. & Fond du Lac R. R. Co.*, 42 Wis. 306, 310.

A still further complaint is that the court did not instruct the jury that, even if plaintiff were guilty of negligence in coiling the wire and hanging it in a place dangerous to those using the looking glass, still the defendant would be liable if, after knowledge of such negligence, it might, by the exercise of ordinary care, have averted the injury. This is the doctrine of comparative or ervening negligence, which has no place in the jurisprudence his State. If plaintiff's own negligence caused or contributed the injury proximately, the defendant is not liable, unless lty of gross negligence, as recently defined by this court. *ermolen v. Fox River Electric Railway & Power Co.*, 110 . 154, 85 N. W. 663, and cases cited.

4. Another assignment of error is based upon refusal to grant a new trial upon the affidavit of one of the jurors that, while he agreed and consented to answer the sixth question as to contributory negligence in the affirmative, he did so against his conviction that the true answer should have been negative, by being induced to believe that the affirmative answer would be immaterial and not prevent the plaintiff's recovery, and that such belief was brought about by the statement of a fellow juryman that on some previous occasion he had been advised by a distinguished lawyer to that effect, and knew it was so. We find nothing in this affidavit to make it the duty of the court to set aside a verdict. It does not in any wise avert the fact that the verdict, as filed, was that agreed upon, and it does show that in this instance at least the trial court was peculiarly successful in securing an answer to this question not induced by a desire to favor the party in fact benefited by it. One of the important purposes of the special verdict is to secure the answer of the jurymen upon the concrete issues of fact in ignorance of the legal effect of their answers, so that they may be unbiased by favor or antagonism to either side. It certainly is no ground for setting the verdict aside that such end has been accomplished in the present case. However, the affidavit in no wise impugns the correctness of the written verdict as expressing the conclusion in fact agreed to by the jurors. It, at most, suggests the mental processes on affiant's part which led him to such agreement. We think this form of attack upon a verdict is entirely against the weight of authority, as is at least intimated in *Wolfgram v. Schoepke*, 123 Wis. 19, 100 N. W. 1054, where most of the cases on the subject in this State are gathered; also in *Hempton v. State*, 111 Wis. 127, 145, 86 N. W. 596.

We find no prejudicial error necessitating reversal.

Judgment affirmed.

OTHER 1905 CASES NOT REPORTED IN FULL.

1. **Eminent Domain, When Furnishing Electricity Is Public Use. (1-3.)**
2. **Death of Horse from Contact with Telephone Wire in Street. (4.)**
3. **Death from Contact with Incandescent Light. (5.)**
4. **Injury to Boy from Contact with Telephone Wire in Street (6.)**

5. Injury from Electric Shock from Brass Rail in Front of Bank. (7.)

6. Fire from Lightning Entering Building over Telephone Wire. (8.)

7. Fire Caused by Escaping Electricity Burning Lead Connection to Gas Meter. (9.)

8. Telephone Company, Power under Statute to Conduct Lighting Business. (10.)

9. Franchises, Power of City to Grant for Electric Light and Power Plants. (11.)

10. Excavation in Streets by Electric Light Company, Compliance with Ordinance. (12.)

11. Moving Buildings, Cutting Electric Light Wires. (13.)

12. Injury to Passenger Frightened by Explosion in Car. (14.)

13. When Judgment against One Party Releases the Other. (15.)

14. Taxation of Franchise of Electric Light Company. (16.)

15. License Tax on Poles of Electric Light Company. (17.)

1. **Eminent Domain — Public Use.** — In the case of *Brown v. Gerald et al.*, 100 Me. 35, 61 Atl. 785, it was held that manufacturing, selling, distributing, and supplying electricity for power, for manufacturing, or for mechanical purposes is not a public use for which private property may be taken against the will of the owner. A corporation empowered by its charter to generate and transmit power for lease or sale, and having granted to it a right of eminent domain does not by accepting the provisions of its charter become a *quasi*-public corporation, and does not thereby become invested with the right to exercise the power of eminent domain for the purpose of supplying electric power for manufacturing purposes.

2. **Eminent Domain — Power in General — Public Use — Furnishing Electricity to Municipality.** — *In re East Canada Creek Electric Light & Power Co.*, 49 Misc. 565, 99 N. Y. Supp. 109, a proceeding was brought to acquire lands for the purpose of enabling the petitioner to furnish more electric power. It was held that the furnishing of light to a municipality is a public service, and an electric light company in any town or village in this State having contracts with towns or incorporated villages for the lighting of streets, though a private corporation, may acquire lands by condemnation to enable it to increase its power in order to furnish more electricity under such contracts.

3. **Eminent Domain — Public Use.** — In the case of *State ex rel. Tacoma Industrial Co. v. White River Power Co. et al.*, 39 Wash. 648, 82 Pac. 150, it was held that a power company, organized to furnish electric power which had no franchise to enter certain designated cities, and was under no contract or obligation to furnish electricity to any person, or for any purpose, was not authorized to take private property under the power of eminent domain.

4. **Death of Horse from Contact with Telephone Wire in Street Which Had Been Broken and Caused to Fall Across an Electric Light Wire by a Severe Storm — Presumption of Negligence — Guard Wire.** — In the case of *Aument v. Pa. Telephone Co.*, 28 Pa. Super. Ct. 610, an appeal was taken from an order of a lower court refusing to take off a nonsuit in an action for the killing of a horse by contact with a live

wire in the street. It appeared that a single set of poles carried the wires of the telephone company and that fifteen feet below them the wires of the Lancaster Electric Light Company were placed. During a severe sleet storm a wire of the telephone company broke and fell across a wire of the electric light company the end lodging in a pool of water in the gutter. The court said: "There was evidence from which a jury could have found, if the question had been submitted to them, that by reason of its contact with the electric light wire, the telephone wire and the pool of water became heavily charged with electricity, and that in consequence the plaintiff's horse, when being led through the pool to the stable for shelter, received a shock and fell to the ground, where he came in contact with the live telephone wire, which was lying in the water, and was killed. The fact that the plaintiff's employee, who was leading the horse, did not receive a shock is explained by his testimony that he had on rubber boots. He also testified that, although he saw broken wires in that immediate vicinity, he did not see the wire in the water, and did not know it was there * * * upon the testimony presented by the plaintiff, the court would not have been warranted in declaring as matter of law that the employee in charge of the horse was guilty of contributory negligence * * * to hold that, as between the telephone company and one with whom it had no contract relation, *prima facie* presumption of the company's negligence is raised by proof that its wire broke under the strain of a sleet storm * * * would require us to go far beyond any Pennsylvania decision bearing upon the use of electricity to which our attention has been called."

It was held that, there being no evidence that it was customary or practical for telephone companies to maintain guard wires under the circumstances of the case, such question should not be submitted to the jury to determine that the defendant was negligent in failing to maintain guard wires in case of their falling from coming in contact with electric light wires on the same pole. It was also held that a finding that the defendant was negligent because it did not learn of and repair the break in its telephone wire within one and one-half hours after it occurred would be unreasonable.

Judgment affirmed.

5. Death from Shock from Incandescent Light — Presumption of

candescent lights is not dangerous. It was also in evidence that there were electrical disturbances the night before the accident upon wires connected with the pole upon which the transformers were placed and that there were electrical shocks in other business houses, the wires of which were connected with the same transformer as the wires of the bank.

It was held that the fact of such excess current entering the bank over the wires of the defendant made out a *prima facie* case of negligence, and that it was error to refuse to so charge the jury. It was also held erroneous to charge the jury that if they should find that if the insulation had been perfect that the excessive current would not have killed the decedent, that the verdict should be rendered for the defendant, where the insulating material upon the cord attached to the lamp had become partly worn off by constant use, but still not sufficient to render it dangerous when an ordinary current was in use.

It was not sufficient to rebut the *prima facie* case for the defendant to simply prove by witnesses that its transformer was apparently in good condition soon after the accident and that its primary and secondary wires showed no evidence of having been in contact. Judgment for the defendant reversed.

6. Telephone Wire Across Trolley Wire — Injury to Boy — Complaint — Evidence. — In the case of the *North Amherst Home Telephone Company et al. v. Jackson*, 26 Ohio Cir. Ct. 89, an action was brought to recover damages for injuries to a boy resulting from an electric shock. It appeared that a trolley company fastened a "pull-over" wire by wrapping it around a tree with dry boards between the trolley wire and the tree. Between the trolley wire and the tree there was placed what is known as a "globe" insulator for the purpose of cutting off the electric current. About thirty inches above this "pull-over," and between the insulator and the tree and crossing the line of the "pull-over" wire, the telephone company had strung four of its wires; there were no guards or insulators upon the guards of either company at the place of the crossing and nothing to prevent the telephone wires from sagging down upon the "pull-over" wire. This crossing point was over one of the public streets.

On a certain evening there was a severe electric storm during which a barn was set on fire, probably by lightning, and the plaintiff, a boy about eight years of age, with many others went to the fire. In walking along the public street or sidewalk on his return he came in contact with one of the telephone wires which in some manner had been broken or burned off and was hanging over the "pull-over" wire of the railway company. This wire was charged with electricity to such an extent that the plaintiff was severely shocked and burned.

It was held that allegations in the complaint that at the time of the accident the wires were heavily charged with electricity "without any of said wires of either of said companies being properly insulated or protected by guards from coming in contact with one another at said point of crossing, as in the exercise of ordinary care of said defendant they should have done" are sufficient to charge that there was not a proper insulation of the wires of either company and that at the point of crossing there was not proper guards.

The defendant having offered evidence to show that a certain insulator was a proper and safe one and that there was none better to his knowledge, it was competent for the plaintiff to show the comparative merits of the in-

sulator used with other makes used by telephone and electric companies for their electric wires.

It was prejudicial error to permit a witness for the plaintiff to testify that owing to defective insulation elsewhere electricity escaped from the wires of defendant company at another point along the line at a time other than that of the accident.

Judgment for plaintiff reversed, because of error in the admission of evidence.

7. Injury from Electric Shock — Nuisance. — In the case of *Whaley v. Citizen's National Bank*, 28 Pa. Super. Ct. 531, an action was brought to recover damages for personal injuries from an electric shock. It appeared that the defendant placed a brass rail in front of its windows four or five feet above the sidewalk for the purpose of protecting the windows and front of the building from persons in the habit of congregating on the sidewalk. The defendant connected this rail with an electric battery controlled and operated inside the building. The evidence tended to show that this battery was frequently used, and that several persons were more or less shocked who came in contact with the brass rail. The plaintiff alleges that on a certain evening he stopped in front of the bank to speak to a friend and without notice of any danger laid his left hand on the rail and instantly received a shock of electricity which rendered him unconscious for several minutes. There was also evidence that the most severe shocks occurred at times in the evening when the bank had closed its doors for business; that the janitor of the bank was a colored man; that on the evening of the accident, and just prior to the plaintiff's injury a colored man disappeared around the corner of the street in direction of a side door leading into the bank; that shortly after the time of injury a colored man was seen within the bank; and that before the employees of the bank left the building on the evening of the accident the wire connecting the rail with the battery had not been disconnected, but was left in a position to be used by any person who might be in the banking room.

It was held that the defendant having placed the rail upon a public street and connected therewith an electric battery, was bound to know that it might be dangerous, and to know the extent of the danger and to use the very highest degree of care practicable to avoid injury to persons who might be liable to come in proximity of the rail and who might come accidentally or otherwise in contact therewith; that under the facts in this case there was a presumption of negligence on the part of the defendant; that negligence committed by a servant in the course of his employment, although he acted without the knowledge or contrary to the known wishes of the master, renders the master liable.

Such a device was unlawful and amounted to a nuisance *per se*, and being a nuisance the defendant was liable for damages caused by it regardless of the question of negligence. This view renders it wholly immaterial who turned on the electricity.

Judgment for the plaintiff affirmed.

8. Fire by Lightning Entering Building over Telephone Wire. — In the case of *Byron Telephone Company v. Sheets*, 122 Ill. App. 6, an action was brought to recover damages for fire alleged to have been caused by lightning entering a building over the ground wire of a telephone company. The principal contention of the defendant was that it was only bound to exercise

reasonable care to protect its customers from damages from the use of such current of electricity as was generated and used by it in its business, and that it was not required to protect its customers against damages resulting from electricity coming from its wires from electrical storms.

It appeared from the evidence that the defendant was negligent in the placing of its ground wire and that if the defendant had used the usual and ordinary means of grounding its current no damages would have occurred. It was held that in the absence of stipulations to the contrary, those who engage in the business of serving the public with telephones must be held to possess and employ requisite knowledge and skill to protect their patrons as far as practicable from the dangers incident to the business, whether those dangers arise from the current employed by them or such as may reasonably be expected to get on the wires from other sources.

Judgment for the plaintiff affirmed.

9. Electric Companies — Liability for Escape of Electricity Causing Fire — Presumption of Negligence. — In the case of *Marsh et al. v. Lake Shore Electric Railroad et al.*, 28 Ohio Cir. Ct. 9, an action was brought to recover damages for loss to a stock of goods in a store building by reason of fire alleged to have been caused by the negligence of the defendants in allowing electricity to escape. The following is the syllabus written by the court: "The mere fact that electricity, generated by an electric railroad company, escaped from its trolley wire to one of its span wires; thence to a telephone cable of a telephone company; thence to the telephone cable of another telephone company; thence to a gas pipe in the store building; thence to the lead connection of a gas meter in the basement, this it melted off, igniting the gas, setting fire to the floor above and damaging the stock of goods, does not render all or any of said companies liable in damages to the owner of the goods, in the absence of proof of negligence on the part of one or more of said companies."

Electricity is of a highly dangerous character, but of such common and recognized use in modern civilization that its use and keeping are sanctioned by law, and if injurious consequences follow from its use and keeping, negligence of the user or keeper must be shown to render him liable to one injured by an electric current.

In the absence of a contractual relation between the parties or of a statute regulating the matter, the doctrine of *res ipsa loquitur* applies only to the case of such highly dangerous things or agencies as are kept or used solely because of their highly dangerous character, and not to electricity, which is classed with steam rather than dynamite.

A judgment in favor of the defendants affirmed.

10. Telephone Company — Power under Statute to Conduct Lighting Business. — In *Brown v. Maryland Telephone & Telegraph Co. of Baltimore*, 101 Md. 574, 61 Atl. 338, an appeal was taken by the complainant from a decree dismissing a bill for an injunction. The court said: "The controlling question * * * to be considered is whether the defendant company, the present appellee, has the power to do an electric light business in the city of Baltimore and elsewhere. It is conceded that it had no such power when first incorporated in 1890 under the name of the Writing Telegraph Company, but it is contended by the defendant that this power was fully granted by Acts 1892, p. 662, c. 469. The Writing Telegraph Company was incorporated under section 24, class 11, art. 23, Code Pub. Gen. Laws 1888,

which provides for the formation of corporations 'for constructing, owning, or operating telegraph or telephone lines in this State * * * and for the transaction of any business in which electricity over or through wires may be applied to any useful purpose.'" The decree dismissing the bill for an injunction was affirmed and it was *held* that, under the statute in question, the defendant, having obtained the city's consent, had the right to conduct an electric lighting business in the city of Baltimore.

11. Municipal Corporations — Power to Grant Franchises for Electric Light and Power Plants. — In the case of *The State of Washington ex rel. Prosser, etc., Co. v. Taylor*, 36 Wash. 607, 79 Pac. 286, an appeal was taken from a judgment sustaining a demurrer to an answer and directing the issuance of a writ of mandamus compelling the defendant, the mayor of a city of the fourth class, to sign an ordinance granting a franchise to an electric light and power company. It was held that such a city was authorized by its charter to pass such an ordinance, although a previous franchise, which was not exclusive, had been granted to another party, and that the judgment of the lower court should be affirmed.

12. Electric Lighting Company — Excavation in Streets — Compliance with Ordinance Requiring Permit and Deposit. — In the case of *Cook v. North Bergen Tp. et al.*, 72 N. J. L. 119, 59 Atl. 1035, the plaintiff brought *certiorari* against the township of North Bergen to review a conviction for the violation of an ordinance requiring persons desiring to excavate the streets or highways to obtain a permit from the township committee and deposit $10 as security for the restoration of the street or highway to its natural condition. It was held that an ordinance requiring such a permit and security was applicable to and binding upon an electric lighting company which was previously authorized by statute and ordinance to erect poles in the streets and highways.

13. Moving Buildings — Cutting Electric Light Wires — Statutes. — In the case of *A. M. Richards Building Moving Company v. Boston Electric Light Company*, 188 Mass. 265, 74 N. E. 350, it was held that Pub. Sts., c. 109, § 17, authorizing the cutting of telegraph and telephone wires in order to move buildings, was extended by the statute of 1883, c. 221, so as to apply to electric light companies.

Mo., loc. cit. 432, 54 S. W. 470; *Mathew v. Railway* (Mo. App.), 78 S. W. 271. Plaintiff made a *prima facie* case by showing she was free from blame and that the accident occurred. *Olsen v. Railway, supra*, and cases cited; *Clark v. Railway, supra*. In Clark's Accident Law, Street Railways (2d ed.), § 50, it is said: 'Where an electric car bursts into flames, the company must explain the cause of the fire.' This text is supported by *Poulsen v. Railroad*, 7 Am. Electl. Cas. 675, 30 App. Div. (N. Y.) 246, 51 N. Y. Supp. 933; *Leonard v. Railroad*, 7 Am. Electl. Cas. 682, 57 App Div. (N. Y.) 125, 67 N. Y. Supp. 985; *Buckbee v. Railroad*, 7 Am. Electl. Cas. 692, 64 App. Div. (N. Y.) 360, 72 N. Y. Supp. 217, and *Cassaday v. Railway* (Mass.), 1 St. Ry. Rep. 330, 68 N. E. 10, in all of which flashes of electricity and fires occurred on street cars in operation and carrying passengers. And in *Poulsen v. Railroad*, 18 App. Div. (N. Y.) 221, 45 N. Y. Supp. 941, it was held: 'Where an electric car burst into flames, and a child, who is in the car, becoming frightened, jumps out of it and is thereby injured, the railroad company is called upon to explain the cause of the fire.' In *Hill v. Scott*, 38 Mo. App., loc. cit. 374, quoting the language of Mr. Chief Justice Erle in his celebrated judgment in the case of *Scott v. London & St. Catherine Docks Co.*, 3 Hurl. & C. 596, 601, it is said: 'There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.' *Hill v. Scott* is approvingly cited in *Seiter v. Bischoff*, 63 Mo. App., loc, cit. 160; *Ward v. Steffen*, 88 Mo. App., loc. cit. 576; *Raney v. Lachance*, 96 Mo. App., loc. cit. 484, 70 S. W. 376. In *Turner v. Haar*, 114 Mo. 335, 21 S. W. 737, the same rule of evidence was applied. Indeed, the judgment of Chief Justice Erle in the Scott case has been adopted as a rule of evidence in most, if not all, the States of the Union and by the federal courts. See note to *Barnowsky v. Helson* (Mich.), 50 N. W. 989, 15 L. R. A. 33. All the evidence conduces to show that the explosion, flash, or whatever it may be termed, was unusual and severe. It broke out the window glass in the car and set the car on fire, frightened the passengers, causing them to rush to the doors and open windows of the car to escape what appeared to them to be an impending danger. In the rush, plaintiff either jumped, or was pushed out of a window, receiving injuries. We think plaintiff was entitled to go to the jury on this evidence. But defendant contends that the petition alleges the explosion was caused by a defective motor and the plaintiff offered no evidence that the motor was defective. The petition does allege the motor was defective, but it does not stop with the motor; it also alleges that the machinery, appliances, and parts thereof were defective, embracing within its scope every electric agency in or upon the car for its operation and is broad enough to take under its outspread wings not only the motor but any and all the other electric appliances or parts thereof with which the car was equipped, including the burnt-off wire which defendant's witnesses testified caused the electric flash and fire."

15. When Judgment against One Party Releases the Other.—In the case of *Hayes v. Chicago Telephone Company*, 218 Ill. 414, 75 N. E. 1003, an action was brought against the city of Chicago and the Chicago Telephone company to recover damages for the death of plaintiff's intestate from an electric shock.

It was held that if the liability of the telephone company for the death of the plaintiff's intestate rested upon the alleged negligence of the city which was in control and possession of the wire by permission of the telephone company, a judgment in favor of the city releases the telephone company from liability.

16. Taxation — Franchise of Electric Lighting Company. — In the case of *Stockton Gas & Electric Co. v. San Joaquin County*, 148 Cal. 313, 83 Pac. 54, it was held that the franchise of an electric lighting company, granting the right to use conduits and poles for the transmission of electric light to a city and its inhabitants, invested the company with an easement in the streets, real property, the *situs* of which was necessarily local and subject to local taxation.

17. Taxation — License Tax on Poles of Electric Light Companies — Reasonableness of Tax — Question for Jury. — In the case of *West Coushohocken Borough v. Coushohocken Electric Light & Power Company*, 29 Pa. Super. Ct. 7, an action was brought to recover a license tax placed on electric light poles by an ordinance. It was held that the question as to the reasonableness of the fee was one for the court and not for the jury.

MORGAN v. WESTMORELAND ELECTRIC CO.

Pennsylvania Supreme Court — Jan. 2, 1906.

213 Pa. 151, 62 Atl. 638.

DEATH OF LINEMAN — NEGLIGENCE OF ELECTRIC LIGHT COMPANY — DEFECTIVE INSULATION. — In an action to recover for the death of an employee of a telephone company, caused by contact with an iron brace charged with electricity by an electric light wire, it was *held* that the electric light company was negligent in not properly insulating its wires.

Appeal by defendant from judgment for plaintiff. *Affirmed.*

these two electric wires or either of them were defectively insulated, the defendant would not, on that account, be liable for the death of plaintiff's decedent, there being no evidence that the defendant had notice of the defective insulation, and no evidence as to the cause of the defect. Answer: We have already spoken at some length on that point in the general charge. The question referred to in this point cannot with propriety be disposed of as a question of law by the court. There is evidence respecting the manner in which the wires were carried through on the cross-arms, which tends to show the mode adopted from the beginning to have been faulty in construction. With respect to such faulty construction, if it exists, no notice is necessary. With respect to the wires being in a defective state of repair, notice is necessary, but it may be constructive as well as direct. There is testimony bearing on the ordinary life of insulation and also on the length of time these wires had been in use. There is testimony tending to show that the wire had sagged from its proper position, and that the insulation was worn off at the point of contact with the carriage bolt. If the insulation was, in fact, removed by erosion, the consideration of the question of the duration of time while that process was going on is not irrelevant. There is evidence that several years before a wire on the upper cross-arm, when it had become displaced, caused a lineman to receive a shock. Although that specific displacement of the other wire was at once remedied, and did not exist at the time of the accident, yet it may be considered specific notice of the danger attending a displacement of the wire, and an admonition with respect to the thoroughness with which inspection should be maintained. The high voltage of the current is also an admonition with respect to what thoroughness of inspection is due. The defendant may be held responsible for defects in the state of repair of its appliances of which it has express notice, and also for accidents arising from defects which this supervision, reasonably exercised, would have disclosed. Whether there was a long or a short period of displacement of the wire and wearing of the insulation which an ordinary diligent examination exacted by the circumstances would have disclosed, is a question for the jury, especially when we consider the nature of the inspection which the defendant company's testimony shows was made. The question of notice seems to us to be one not to be disposed of as a question of law by the court, and the point is therefore refused. * * * (6) Under all the evidence in this case, and under the pleadings, your verdict must be for the defendant. Answer: This point is refused for the reasons that are already indicated."

Before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

John B. Head, D S. Atkinson, W. C. Peoples, and *J. S. Moorhead,* for appellant.

Curtis H. Gregg and *Sidney J. Potts,* for appellee.

Opinion by FELL, J.:

Three questions are presented by the specifications of error: (1) Did the issue raised by the pleadings include the subject of

the original construction of the appellant's lines of electric light wires? (2) Was there sufficient evidence of constructive notice of defective insulation to sustain a recovery on the ground of failure to maintain the wires in a safe condition? (3) Did the evidence warrant the conclusion that defective insulation of one of the wires was the proximate cause of the accident?

It is averred in the declaration that the appellant owned, maintained, and operated two lines of wires extending from its main line to the cross-arms of a pole which sustained a number of telephone wires; that, not regarding its duty to maintain these wires in a safe condition, it "negligently and carelessly allowed and permitted said two wires without proper insulation to be placed on a cross-arm of said pole, thereby charging said arm and braces attached with a powerful current of electricity." The placing of the wire on the cross-arm was a part of the construction, and the averment gave notice to the appellant that the plan of construction was brought into question. The case was tried upon this theory. Testimony as to the construction as it existed at the time of the accident was admitted, without objection that it did not support the declaration, and affirmative evidence was introduced by the appellant to show the plan of original construction. If there is doubt as to the sufficiency of the averment, it is too late to raise it after a trial on the merits, in which the question was treated by both parties as a part of the issue.

On the question of constructive notice, the instruction was that with respect to faulty construction notice was unnecessary since

a consideration a telephone company to use one of its poles. On this pole there were eleven cross-arms, which supported 130 telephone wires. The cross-arms were twenty-two inches apart, and each one was supported by iron braces which extended down the pole to within a few inches of the next lower arm. The appellant's electric light wires were attached to the faces of the seventh and eighth cross-arms, and extended across the lines of telephone wires. They were held in place at the cross-arms by the use of porcelain knobs, and their insulation was by cotton covering ordinarily used for inside wiring. These wires had been in use seven years, and the covering of the wire on the seventh cross-arm was worn off at its point of contact with an iron bolt which passed through a brace. It was customary for persons climbing among the wires for the purpose of inspecting or repairing them to use the braces as an aid in climbing, and as supports. The appellee's son was in the employ of the telephone company and was last seen alive when at about the fifth cross-arm. He was killed by an electric shock, and his body was found on the wires supported by this cross-arm. Evidently he had been above these wires or his body would not have fallen on them, and when above them, he would have been in close proximity to the brace of the seventh cross-arm, which was charged with electricity, and its position was such that he probably would have grasped it in climbing.

There was no direct evidence that the deceased was killed by coming into contact with the iron brace. But direct evidence was not essential. The cause of death might properly be inferred from the location of his body with relation to the dangers to which he was exposed. The telephone wires were in themselves harmless, and death by electricity could have been caused only by the deceased coming into contact with some object charged with a powerful current. This object was at hand in a position where any one climbing the pole would be likely to touch it. Conditions were shown to exist which indicated very clearly the cause of death, and no other cause being shown the jury were warranted in finding that this was the cause.

The judgment is affirmed.

HORNING v. HUDSON RIVER TELEPHONE COMPANY ET AL.

New York Appellate Division, Third Department — Jan. 8, 1906.

111 App. Div. 122, 97 N. Y. Supp. 625.

INJURY TO FIREMAN BY CONTACT WITH LIVE WIRE — FAILURE TO PROTECT ELECTRIC LIGHT WIRES — FAILURE TO PROPERLY SUPPORT TELEPHONE WIRES — PROXIMATE CAUSE. — In an action against a telephone company and electric light company, it appeared that the plaintiff, a fireman, while going to a fire found a telephone wire breast high across the path through which the fire engine must pass. In attempting to remove it he was burned and injured. It was shown that said wire, owned by the defendant telephone company was not strung on poles but attached by brackets to wooden buildings with spans of from 519 feet to 168 feet. The wire had been abandoned for some time. Because of the fire in one of the wooden buildings to which it was attached, the wire had fallen on an unprotected wire operated by the defendant electric light company. The said electric light wire was unprotected by guard wires and was not insulated. The telephone wire was strung eight feet above such electric light wire. There was evidence that insulation or a guard wire over the light wire, if kept in proper condition would have prevented the transmission of the current to the telephone wire.

It was held that the negligence of both defendants was properly left to the jury and that a verdict for the plaintiff was warranted; that the question as to whether the defendants in the exercise of reasonable prudence could have anticipated that said building might burn and bring the wires into contact was for the jury; that the failure of the defendants to properly protect the wires was the proximate cause of the injury and not the burning of the building which caused the falling of the wire.

Appeal by the defendants from a judgment of the Supreme Court in favor of the plaintiff and from an order denying the defendant's motion for a new trial. *Affirmed.*

The defendant gas and electric company is a duly organized corporation, exercising its franchise to furnish light and power by electricity to the city of Johnstown, and it was lawfully operating in the streets of such city. It had extended its wires through West Montgomery street, and such line seems to have been in all respects well and thoroughly constructed and insulated from the ground at that locality. The defendant telephone company was also a corporation lawfully exercising its franchise to act as such through the streets of such city. Some six or seven years after such light company had erected its said lines through said street, such telephone company carried its wires from the West Mill of one Stewart, and which was on the west side of such street, across said street to the East Mill, so-called, of said Stewart on the easterly side of such street, and thence from such East Mill to the Geisler Mill, so-called; and the only support of such wires were the wooden buildings to which they were attached. On the night of July 6, 1903, the Geisler Mill took fire and burned down. During the progress of the fire, the plaintiff,

who was a member of the fire department of said city, on his way to such burning mill, passed through a lane on the premises of Stewart, and which was used in connection with such East Mill, and found the telephone wire that had extended from Stewart's East Mill to the Geisler Mill lying across such lane and about breast high, and evidently an obstruction to any hose cart or fire engine that should attempt to pass through there. He, with Stewart, who was with him at the time, took hold of such wire and attempted to break it and remove it from that position, and, after continuing such effort for a short time, he received a shock which resulted in a very serious burning and injury. For the injuries so sustained he brought this action against these defending companies, claiming that it was caused by their negligence. Such claim of negligence was based upon the proposition that the current which injured the plaintiff had been diverted from the electric company's wire by the telephone wire having fallen upon, and come in contact with, such wire, and that such contact was caused by the negligent manner in which such wires were put up and maintained. The jury rendered a verdict for the plaintiff and against both defendants, and from the judgment entered thereon, and from an order denying a motion for a new trial, this appeal is taken. Further facts appear in the opinion.

Before PARKER, P. J., and SMITH, CHASE, and CHESTER, JJ.

John A. Delehanty and *James J. Farren,* for appellant telephone company.

Fred Linus Carroll, for appellant electric company.

Andrew J. Nellis, for respondent.

Opinion by PARKER, P. J.:

By the evidence in this case, this situation was presented to the jury: The light company had constructed its poles and wires through West Montgomery street. It was lawfully authorized to use such street, and such construction was the usual and standard one. The span at the place where the contact complained of took place was upon good substantial poles, well insulated from the street, and was 168 feet in length. The telephone company thereafter erected its line into that part of the city, and stretched a wire some eight feet above the light company's wires, crossing Montgomery street and the Cayadutta creek adjacent thereto, and also over a bridge that crosses such creek. This locality is in the extreme suburbs of the city, and where the buildings are some considerable distance apart. Such telephone wire, instead of being supported by poles, is attached to brackets which are fastened to the roofs of the wooden buildings some thirty feet from the ground. The west end of such telephone wire was at-

tached to a bracket fastened to the roof of Stewart's West Mill, so-called. It then extended across the creek and street at a height of eight feet above the upper wires of the electric lines, and was fastened to a bracket on Stewart's East Mill, so-called. It then proceeded in a northeasterly direction across private property and some thirty feet above the earth, to the Geisler Mill, making a span of some 519 feet. From thence it extended a distance of 260 feet to the Lefler Building, and thence to other buildings and poles connecting with the telephone company's lines throughout the city. The span from the West Mill to the East Mill over the light company's wires was 232 feet. It may be assumed that the brackets were well and securely fastened to the buildings, and that the telephone wire was tightly stretched such distance of thirty feet above the earth. No poles or supports, other than the buildings mentioned, were used, and the spans so created by that method of sustaining the wire were unusually long. When first put up, this wire was used to furnish telephone service to the several mills in that locality, but for some year and a half before the accident such service had been withdrawn and the use of such wire abandoned; and it is apparent that for that period little attention had been paid to inspecting such wire. The general construction of the light company's line in Montgomery street was a standard one. The claim of the plaintiff, however, is that, under the conditions that were presented by the construction and maintenance of the telegraph wire in the manner above stated, and in view of the strength of the electric current which was taken through its upper wires for the purpose of lighting the streets, viz., 3,500 volts, an especial duty was put upon each company to provide other and better safeguards against a contact between their respective wires than were provided, and to prevent, by better insulation of their respective wires, a transmission of the electric current in the event that a contact did occur. Upon this claim the trial court charged the jury as follows:

"The electric light company says that its plant was standard construction throughout, and that for the ordinary purpose of conveying electricity plant was beyond criticism. And unless you find that there was an unusual and extraordinary situation at the bridge, you would find that the electric light company had in use a standard and up-to-date plant and had taken precaution usually taken where a telephone wire crosses an electric wire."

And it also further charged substantially to this effect: So far as the lighting company is concerned, there is no serious question that this line at this bridge, if it had not been for this crossing, or if the crossing had been made in the usual way, without connection with the buildings, was beyond serious criticism. But the question is whether the electric light company, in the exercise of reasonable prudence, should have noticed the insulation on the respective wires, that the telephone wire was supported upon ordinary wooden buildings, that such buildings were liable to burn and the wires therefore to come in contact, that if contact did occur trouble would arise; and would a prudent man, under such circumstances, have continued the business of carrying electricity through the streets without doing anything to render it any more safe; and could anything be done to render it more safe?

Thus it is seen that the issue upon which the jury have passed was a narrow one. Telephone wires are constantly being taken over electric light wires, and under ordinary circumstances no precautions other than were taken here to prevent contact, viz., a distance of eight feet apart, are deemed necessary; but were the conditions in this case such that reasonable care and prudence required extra precautions? Would guard wires have tended to prevent contact, and should they have been added by the electric light company in this case? Could their respective wires have been so insulated, at the place of this crossing, as to have prevented a diversion of the current in case the telephone wire, for any cause, sagged or fell; and, if so, was there such reason to apprehend a possible sag or fall that a prudent man using such a powerful and deadly current would have so insulated the wires? Such were substantially the questions left to the jury; and whether they were warranted by the evidence in reaching the conclusion which they have reached is the first question for us to examine.

Both companies earnestly contend that, as to a better insulation of the wires, it is plainly shown that there is no insulation either used or made that would be adequate to prevent the transmission of the current from the light wire, carrying the voltage it it did, to the telephone wire, if they came in contact; that refore neither can be charged with negligence in not so insulating them. Undoubtedly all experts agreed that no such insulation

was made or in general use; but, as I understand the evidence, one of the defendants' experts testified that a rubber insulation $^5/_{32}$ inch thick would be adequate to prevent such transmission, if sufficient care and attention was given to keep it in proper condition. I do not find any evidence to the effect that such an insulated wire for a distance of 168 feet could not be procured, or that it could not with reasonable effort be maintained in proper order.

As to the protection from contact by the use of a guard wire above and outside of those carrying the electric current, on the light company's poles, the defendants also urge that the proof shows that such wires are nowhere used for such protection, and that their use adds danger to the situation, rather than prevent a contact. After diligently studying the evidence on this point, I do not concur with their counsel that the evidence is conclusive to that effect. Undoubtedly the evidence of the defendants' experts is that such guard wires are not used for such a purpose, and all substantially agree that, under the conditions which this case presents as to the conditions and supports of the telephone wire, they still thought that the electric company's line at this point was well and properly built and up to standard without their use. But some of such expert evidence agreed that such a a guard, if "properly installed, inspected, and maintained, would act as a source of safety." And the question is whether in this particular case such a guard could not have been "properly installed, inspected, and maintained," and thus have prevented the contact that worked this injury. I cannot find that it is established by the evidence that it could not, or that its use was either unsafe or impracticable. On the contrary, it seems to me that for the distance of 168 feet, which was the length of the span over which the telephone wire hung, such a guard could have been easily erected and maintained, and I am not prepared to hold that the jury erred in arriving at that conclusion.

The jury have evidently concluded that other practicable provisions against the two wires coming in contact, and the diversion of the current from the one to the other, could have been taken by the defendants, and each of them; and under this evidence I am not disposed to disturb the finding of the jury on such questions.

Of course, the fact that such precautions could have been taken, and would probably have prevented the injury, does not render either defendant liable for this injury, unless it was negligence on its part not to have taken it. Each defendant vigorously urges that, unless the Geisler Mill had burned, the telephone wire would not have fallen, and the method of protecting against contact of the wires and transmission of the current would have been entirely sufficient. And that it is beyond reason to require them to anticipate such burning, and to take unusual precautions in exception thereof. In other words, they deny that there were any conditions that did or should have suggested a falling wire and extra precautions to prevent it. That I think was a question properly submitted to the jury. Of course, the jury might properly charge the electric company with knowledge of the precise situation of the telephone wire as it was stretched and supported over and beyond its line. It was its plain duty to know that condition, to consider how it affected its own line, and, if there was anything indicating danger, which a reasonably prudent man would take notice of, then such company should have noticed it and protected against it, so far as in the exercise of reasonable care and prudence it could have protected against it.

The plaintiff calls attention to the fact that each of the supports of this telephone wire from and including its west end to the Geisler Mill, and for some distance east of it, was a wooden building, either one of which was much more liable to burn than a pole would be. That the first span from the easterly support of the span crossing the electric light were, viz., Stewart's East Mill, was 519 feet long, and the further end of that span was the Geisler Mill. No support of any kind for that long distance was between those two mills. So that, if either of those two buildings burned it was to be expected that both ends of such span would be loosened from its support. And therefore, if either one of the several buildings burned, it was to be expected that the telephone line would be disturbed probably the whole length of it and thus threaten to loosen the telephone wire and cause it to sag or fall. These and sundry other arguments were presented to the jury as showing that reasonable prudence should have discovered that the result of a fire, although as far away as the Geisler Mill, was an event which, if it did happen, would be

likely to bring about a contact between the two wires, and very clearly, as they argued, if either building at the east or west end of the telephone span crossing Montgomery street was burned, contact would be sure to follow. The question as to whether each defendant should not in reasonable prudence have so far anticipated the burning of some one of such buildings as to require it to protect against the clear result likely to follow therefrom was in my judgment one of fact for the jury.

We have, then, the decision of the jury, to the effect that, under the circumstances thus presented to the two defendants, it was their duty to have taken other and further precautions against contact by their two wires; and that there were precautions which in the exercise of reasonable inspection and diligence they could have taken; and that their neglect to so take them was a negligent omission which caused the contact now complained of. Taking the whole evidence in this case, I am of the opinion that we should not disturb either of such conclusions.

It is further urged upon us by the defendants that, even though they were negligent in not better guarding against the contact of their wires and the diversion of the electric current from the one to the other, nevertheless, such negligence was not the proximate cause of the plaintiff's injury, and that therefore he cannot recover in this action.

It is plain that, if by its fall the telephone wire had not come in contact with the electric wire and thereby diverted its current, this injury to the plaintiff would not have occurred. It was the transmission of such current into the telephone wire that was the direct cause of the plaintiff's injury; and, if such transmission may be charged to the negligence of the defendants, it is difficult to see why such negligence is not the direct cause of the injury. There is no intervening cause between such contact and the plaintiff's injury; and, if such contact is due to the defendants' negligence, then such negligence is the direct or proximate cause thereof. It seems to me that the negligence which the verdict of the jury has imposed upon the defendants is a negligence to which the act of contact and consequent transmission of the electric current was due. The precise and only negligence with which the defendants are charged is one that makes them responsible for that contact, and hence concede the negligence, and there is really no question of proximate cause in the case.

It is true that if the mill had not burned, and the telephone wire been thereby torn down, there could have been no injury; but that is because there would then have been no contact of wires. In this aspect, the burning of the mill is a concurrent cause of the injury; but it is the remote, and not the proximate, cause. The defendants' omission to guard against the natural result of such remote cause is the negligent act complained of. It may be that the defendants did not neglect any duty they owed to the plaintiff in not anticipating and protecting against that remote cause. I concede that is a question not without doubt; but, if the jury have correctly resolved that doubt, and, as I said above under all the features of this case it should be left to them to determine, I have no doubt that the defendants' omission to protect against contact of their wires was the proximate cause of this injury; and I do not attempt to analyze the numerous cases on that subject and compare them with the facts of this case. In *Laidlaw v. Sage,* 158 N. Y. 99, 100, 52 N. E. 679, 44 L. R. A. 216, is quoted a definition from the American Law Review, which clearly illustrates and determines the question whether the burning of the mill or the negligent omission to guard against contact of the wires should be deemed the proximate cause of the plaintiff's injury.

It is manifest that the question as to preventing contact of its wires, and consequent transmission of the electric current, was as applicable to the telephone company as to the other one, and that the jury had the same warrant to charge negligence in that respect against it, if not more; and hence I have not examined the evidence as applying separately to each case. Upon the finding of the jury and the evidence in the case both are to be charged with a negligent omission in that respect.

I have examined the exceptions taken by the respective defendants upon the trial, and do not find any that I think require a reversal of this judgment.

In my opinion, the judgment and order must be affirmed, with costs. All concur.

ROMANO v. VICKSBURG RAILWAY & LIGHT CO.

Mississippi Supreme Court — Jan. 8, 1906.

39 So. 781.

FIRE — DEFECTIVE WIRING — QUESTION FOR JURY. — In an action for damages caused by defective wiring, the the facts that the fire originated where the wires entered the building, the defective character of the wires used, the manner in which connections were made, *held* sufficient to submit the question of defendant's negligence to the jury.

Appeal by plaintiff from the action of the court in giving peremptory instruction for defendant. *Reversed.*

Brunini & Hirsh, for appellant.

Smith, Hirsh & Landau, for appellee.

Opinion by TRULY, J.:

The trial judge properly refused the peremptory instruction asked by the appellee at the conclusion of appellant's testimony. As the case then stood, the proof was ample to justify the submission of the cause to the jury. The circumstances attending the fire, the fact that there had been no fire in the building for a number of hours, the fact that the fire originated at the exact place where the electric wires entered the building, the defective character of the wires used in installing the electric fixtures, the negligent and unworkmanlike manner in which the connection was made with partially uninsulated wire, the probability of fire being caused thereby — all these things standing undisputed and unexplained demonstrate the correctness of the ruling. Hence it was error to grant the peremptory instruction for the appellee at the conclusion of the case. The testimony introduced by appellee simply conflicted with the proof on behalf of the appellant, and these issues of disputed fact should have been submitted to the decision of the jury.

Reversed and remanded.

Fire Caused by Defective Wiring of Buildings. — See note to *Herzog v. Municipal Electric Light Company, ante.*

MERCED FALLS GAS & ELECTRIC CO. v. TURNER ET AL.

California Court of Appeal — Jan. 24, 1906.

2 Cal. App. 720, 84 Pac. 239.

ELECTRIC LIGHT COMPANIES — USE OF STREETS — ERECTION OF POLES — INJUNCTION. — The original location by an electric light company of its poles by permission of the city authorities, and the retention of said location for a number of years, created no absolute indefeasible right, or irrevocable license, to have each pole remain at the particular spot for all time; and an injunction will not be granted restraining the city from changing the location of the poles.

Appeal by plaintiff from a decree dismissing a bill for an injunction. *Affirmed.*

Morrison & Cope and *Frank H. Farrar,* for appellant.

F. W. Henderson, for respondents.

Opinion by MCLAUGHLIN, J.:

Action for an injunction restraining the board of trustees and superintendent of the streets of the city of Merced from changing the position of certain electric light poles on M street in said city. The city has never owned or controlled public works for supplying artificial light, and, for ten years prior to the commencement of this action, the appellant corporation had been, and then was, furnishing the city and its inhabitants with electric light, and in so doing had maintained nine electric light poles, at as many different corners on the street mentioned, by permission of the city trustees, and without hindrance from the defendants or their predecessors in office. On June 6, 1904, the board of trustees, by resolution, ordered that said poles be changed to other positions than those previously occupied, and appellant failing to remove the poles as directed and required by the resolution, the superintendent of streets, by another resolution, was ordered to make the change, and proceeded to do so, whereupon this action was commenced. The trial court sustained general demurrers to the complaint, and plaintiff declining to amend, two separate judgments were entered, one in favor of the trustees and the other in favor of the superintendent of streets. The plaintiff thereupon appealed from both of said judgments.

The sole contention of appellant in both appeals involves the

power of the city authorities to compel or make the change i question. Under the Constitution of this State, the appella enjoys and is exercising a franchise giving it the privilege, und the direction of the superintendent of streets, or other officers i control thereof, of using the public streets, so far as may be nece sary, for introducing and supplying such city with electric light Const. art. 11, § 19; *Stockton G. & E. Co. v. San Joaquin* (Cal.) 9 Am. Electl. Cas. —, 83 Pac. 54; *People v. Stephens,* 62 Cal 236; *In re Johnston,* 137 Cal. 119, 69 Pac. 973. The constitu tional provision cited does not expressly confer upon persons ex ercising such franchises an absolute right to erect poles of an kind on the streets of a city. Indeed, it might be said that franchise to use the streets for any purpose mentioned in th section, may be confined to "laying down pipes and conduit therein, and connections therewith, so far as may be necessary fo introducing into and supplying such city and its inhabitants eithe with gas light or other illuminating light," etc. It is, howeve unnecessary in this decision to go to the extent of holding that such right may be enjoyed, for, if it be conceded that judici precedents and legislative enactment, establish or declare su right, still the judgment in the case at bar must be sustaine The act under which the city of Merced was incorporated vests i the board of trustees full power to establish, alter, open, improv and repair streets and sidewalks, remove obstructions therefrom and generally to manage and control the same. St. 1883, p. 26 c. 49 Pol. Code, §§ 4354, 4408, 4410, 4411, 4413, and the Con stitution gives every city power to make and enforce within it limits all local sanitary, police and other regulations not in con flict with general laws. Const. art. 11; *Dobbins v. City of Los Angeles,* 139 Cal. 179, 72 Pac. 970, 96 Am. St. Rep. 95. A industrious search has failed to reveal a general law prohibiting the regulation of the use of streets by holders of a franchise. On the contrary, the fundamental law of this State, in conferring th franchise here in question, expressly provides that any individu or company "shall, under the direction of the superintendent o streets, or other officer in control thereof * * * have the pr lege of using the public streets." The power to make needful reasonable regulations touching the use of streets has long b recognized. *Mutual Electric, etc., Co. v. Ashworth,* 118 Cal.

50 Pac. 10; *Ex parte Taylor,* 87 Cal. 94, 25 Pac. 258; *Ex parte Casinello,* 62 Cal. 541; *Vanderhurst v. Tholcke,* 113 Cal. 150, 45 Pac. 266, 35 L. R. A. 267; *De Baker v. Railroad Company,* 106 Cal. 282, 39 Pac. 610, 46 Am. St. Rep. 237; *In re Johnston,* 137 Cal. 120, 69 Pac. 973; *Ex parte Fiske,* 72 Cal. 125, 13 Pac. 310; *Monongahela City v. Monongahela Electric L. Company,* 4 Am. Electl. Cas. 56; *Am., etc., Co. v. Hess* (N. Y.), 3 Am. Electl. Cas. 142, 26 N. E. 619, 13 L. R. A. 454, 21 Am. St. Rep. 764; *Denver v. Girard,* 42 Pac. 662. The city authorities will not be allowed to enforce regulations which are tantamount to a denial of appellant's right to use the streets, or are arbitrary, capricious, unreasonable, or prohibitory in their nature or effect. *In re Johnston, supra; Pereria v. Wallace,* 129 Cal. 403, 62 Pac. 61; *Santa Rosa Lighting Company v. Woodward,* 119 Cal. 30, 50 Pac. 1025. But the Constitution in providing for the exercise and enjoyment of the franchise owned by appellant did not grant an absolute indefeasible right or easement in the particular spots of earth where its poles were planted originally, nor does the grant contain a hint that the superintendent of streets, or other officer in control thereof, exhausted his jurisdiction of power to direct or control the use of the streets by appellant, when the poles were located in the first instance. True, the section provides for general regulations for "damages and indemnity for damages," but this is clearly for the protection of the city (*In re Johnston,* 137 Cal. 120, 69 Pac. 973), and therefore such regulations, or the absence of them, cannot limit or annul the general power granted to the municipality, to direct and control the manner in which the streets shall be used, and the franchise exercised. Courts will not hesitate to stay the arm of municipal power when any attempt to curtail or deny the constitutional right is made manifest or a clear abuse of discretion is shown. But they will as unhesitatingly frown upon the doctrine that the constitutional provision in question must be construed as an abdiction or denial of power on the part of cities to widen, straighten, beautify and improve streets and sidewalks, and to compel property owners of every class and kind to conform to all reasonable regulations redounding to the general good. It is therefore incumbent upon litigants seeking to restrain the exercise of municipal power in this behalf to show by their pleadings that the regulation in question is an unneces-

ties in making the change, and hence it cannot be therefrom whether the regulation is reasonable or u just or unjust, wise or otherwise.

The contention of appellant frankly stated and abl is, that the city authorities are absolutely without pow the poles from the positions they have occupied for so We cannot concur in this view. The original loc poles by permission of the city authorities created indefeasible right, or irrevocable license, to have each at the particular spot for all time; and it is well settl of time creates no prescriptive right to public proper *Visalia v. Jacob,* 65 Cal. 435, 4 Pac. 433, 52 Am. S *Orena v. Santa Barba,* 91 Cal. 631, 28 Pac. 268; *Oak land W. F. Co.,* 118 Cal. 160, 50 Pac. 277; *Home cisco,* 119 Cal. 534, 57 Pac. 950. It may be conten averment of irreparable injury sufficiently shows tha tion is unreasonable and confiscatory. The damag already accrued is estimated at $1,000, and it is diffi why the sum total of damage resulting from the remo the poles may not be as easily estimated and comp is also difficult to imagine how a mere change in th the poles could be fraught with such grave consequ waiving these considerations, it is the established law

venience, and it frequently happens that they forbid the use of streets, and even of private property, in a manner theretofore enjoyed, but the law clearly sanctions such regulations. Respondent's brief contains the statement that a change in the location of the poles is rendered necessary by the construction of artificial stone sidewalks on M street. This statement cannot be considered as a fact in the case, but it serves to illustrate the consequences which would inevitably follow the application of the doctrine for which appellant contends. A village may, perchance, become a city. In such event the footpath or narrow sidewalk which was all sufficient in bygone days may prove entirely inadequate for the accommodation of an increased and increasing population. If poles upon which telegraph, telephone and other wires are strung, must be allowed to remain where they were first located, public improvements and conveniences, made necessary by changed conditions, may be hindered or rendered impossible. Again, the growing needs of a city may invite many to avail themselves of the right to use the streets for purposes enumerated in the section of the Constitution under which appellant acquired an equal but not a superior right. If those already using the streets for such purposes cannot be compelled to submit to reasonable regulations touching the location of poles and wires, then the advent of many competitors may be prevented, and the very purpose of the framers of the Constitution thwarted, unless danger and inconvenience to the general public be totally ignored.

All laws must be so construed as to avoid absurd and incongruous results, and the doctrine which appellant would have us announce would certainly lead to consequences which it is the general object of laws to prevent. All citizens must conform to needful regulations controlling the exercise of personal and property rights, and holders of a franchise constitute no exception to this general rule.

The judgments are affirmed.

We concur: CHIPMAN, P. J.; BUCKLES, J.

STATE v. NEW ORLEANS RAILWAY & LIGHT CO.

Louisiana Supreme Court — Feb. 12, 1906.

116 La. 144, 40 So. 597.

1. ELECTRIC LIGHT COMPANIES — TAXATION — MANUFACTURER. — An electric light company is not a "manufacturer" in the sense of the exemption clause of article 229 of the Constitution of 1898 authorizing the legislature to impose license taxes.
2. SAME. — Where, under identical provisions in two State constitutions exempting "manufacturers" from license taxation, the legislature has for more than twenty years imposed license taxes on the business of gas, electric, waterworks, telegraph, and telephone companies, such a construction is entitled to great weight.
3. SAME — EXEMPTIONS FROM TAXATION. — Exemptions from taxation are strictly construed, and doubt is fatal in such cases.

(Syllabus by the Court.)

Appeal by defendant from judgment in favor of plaintiff. *Affirmed.*

Denègre & Blair, for appellant.

Edward Rightor, for appellee State tax collector.

Opinion by LAND, J.:

Defendant company was ruled by the tax collector to show cause why it should not be condemned to pay a license tax of $1,875, with 2 per cent. per month interest from March 1, 1905, and 10 per cent. attorney's fees, for conducting the business of electric light in the city of New Orleans.

Defendant pleaded for answer that it is exempt from the payment of any license tax as being a "manufacturer" under article 229 of the State Constitution of 1898.

The rule was tried on an agreed statement of facts, and was made absolute as prayed for. Defendant has appealed from the judgment in favor of the State.

It is admitted that, if defendant company is liable at all for the payment of a license tax, the amount sued for is correct.

It is further admitted that defendant employed directly in its electric light plants ninety men, exclusive of solicitors, inspectors, metermen, linemen, bill collectors, office force, storekeepers, etc.,

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Taxation. — See note to *People ex rel. N. Y. Edison Co. v. Feitner, ante.*

and consumes upward of 33,000 tons of coal annually in operating its said plant.

Most of the statement of facts consists of a description by a prominent expert in electricity and electric science of the manner in which the electric light business is conducted. This expert tells us that the burning of coal in a furnace under a boiler produces steam, which through the medium of the engine and other machinery produces the "motion power," used to rotate the armature in a certain relation with the magnetic field; that this rotation of the armature produces currents in the wires which compose the armature; and that these currents are carried along wires to lamps, and there, acting on and through carbon rods, finally produce the well-known electric light.

This expert further says:

"The electricity which furnishes the lights does not exist until the armature revolves. The revolution of the armature brings into being something that did not exist before; that is, this electric energy, or energy in this electric form."

This expert explains in detail the modus by which the light "in the arc" is produced, and says that the operation of a dynamo machine is analogous to that of a pump forcing water through a series of pipes. The expert, in concluding his statement, says that "the energy which becomes light has its origin in the burning of coal under the boiler of the engine," or, in other words, that the electricity which produces the flame in the arc is created by using the latent energy of the coal.

The only question in the case is whether defendant company is a "manufacturer," in the sense of article 229 of the Constitution of 1898, which reads in part as follows:

"Art. 229. The General Assembly may levy a license tax, and in such case shall graduate the amount of such tax to be collected from the persons pursuing the several trades, professions, vocations, and callings. All persons, associations of persons and corporations pursuing any trade, profession, business or calling may be rendered liable to such tax, except clerks, laborers, clergymen, school teachers, those engaged in mechanical, agricultural, horticultural, and mining pursuits, and manufacturers other than those of distilled, alcoholic or malt liquors, tobacco, cigars, and cotton seed oil."

Article 230 of the same Constitution exempted from parochial and municipal taxation for ten years from the 1st day of January, 1900, the capital, machinery, and other property employed in mining operations and in the manufacture of a large number of

enumerated articles. Electric light plants are not included in the list, and therefore are subject to State and municipal property taxation.

The first Legislature which convened after the adoption of the Constitution of 1898 passed a general license tax law, which is still in force. See Act No. 171, p. 387, of 1898. Section 3 of said act imposed a graduated license tax on manufacturers subject to license under article 229 of the Constitution, and section 11 (page 408) for carrying on each business of gaslight, electric light, waterworks, etc. It is to be presumed that section 11 of said act has been enforced from 1898 to the present time and that licenses have been paid in accordance with its provisions.

Article 206 of the Constitution of 1879 and article 229 of the Constitution of 1898 exempt in the same language the same classes of persons from the payment of license taxes. Yet section 4, p. 144, of Act No. 119 of 1880, imposed a license tax "on each business of gaslight, waterworks, telegraphing," etc., "and all other manufacturing and work done with fixed machinery or steam power and not exempted by the Constitution."

In 1884 a new license statute was enacted and a license tax imposed "on each business of gaslight, electric light, waterworks, telegraphing, including local and district telegraphs, telephone exchange," etc.

Hence for more than twenty years the uniform legislative construction of the same provisions in two State Constitutions has been that the business of gas and electric lighting is not exempt from license taxation.

In 1905, for the first time, this construction was challenged in a court of justice by the claim of exemption set up in defendant's answer in this suit.

In *Cooper Manufacturing Company v. Ferguson,* 113 U. S. 733, 5 Sup. Ct. 741, 28 L. Ed. 1137, the court said:

"The act was passed by the first legislature that assembled after the adoption of the Constitution, and has been allowed to remain on the statute book to the present time. It must therefore be considered as a contemporary interpretation, entitled to much weight. *Stuart v. Laird,* 1 Cranch 299, 2 L. Ed. 115; *Martin v. Hunter,* 1 Wheat. 304, 4 L. Ed. 97; *Cohens v. Virginia,* 6 Wheat. 264, 5 L. Ed. 257; *Adams v. Storey,* 1 Paine 79, 90, Fed. Cas. No. 66."

Of course, this doctrine is limited to ambiguous provisions; but, where ambiguity exists, a contemporaneous legislative exposition

"is entitled to grant deference, as it may well be supposed to result from the same views of policy and modes of reasoning which prevailed among the framers of the instrument expounded." 6 Am. & Eng. Enc. of Law (2d ed.) 931.

In *City v. Robira,* 42 La. Ann. 1098, 8 So. 402, 11 L. R. A. 141, which was a license tax case in which defendant claimed exemption as a "photographer" under article 206 of the Constitution of 1879, the court said:

"It is to be observed that the act of the legislature taxes 'photographers' expressly. It must therefore be inferred that the general assembly did not consider them as coming within the constitutional exemption.

"The acts of a legislature are to be treated with the greatest respect, as they emanate from a co-ordinate and powerful branch of government. They must be presumed to be constitutional, unless they be shown manifestly to have transgressed or violated the organic law."

The court further said:

"It may be added that it is universally settled that exemption laws, being in derogation of a general rule, must be strictly construed; that whoever claims shelter under them must prove himself clearly entitled to the immunity; and that in such cases doubt is fatal. Plausible hesitation warrants an adverse finding."

It was the obvious purpose of the framers of the Constitution of 1879 and of 1898 to encourage, by exemption from direct taxation, mining operations and the manufacture of certain articles specifically designated. It is significant that no gas or electric plant or work or public utility of any kind is included in the list. In the article of the two Constitutions relative to license taxation there is exempted "mining pursuits and manufacturers other than those of distilled, alcoholic or malt liquors, tobacco, cigars and cotton seed oil." The articles thus excepted, as well as those specified in article 230, suggest material things in commerce, susceptible of being given new shapes, new qualities, or new combinations by some process of manufacture. Every decision of this court cited by counsel for defendant relates to articles of commerce either in their raw state or after they had gone through some artificial process, and the question decided has been whether the additional work done on such articles can be classified as a manufacturing industry. This question has proved difficult of satisfactory solution and has led to conflicting decisions.

In the ordinary popular meaning of the word, a corporation which operates gas or electric works is not a "manufacturer,"

and is not so styled, though, scientifically speaking, gas or electricity may be a product of manufacture.

In the instant case the popular meaning of the term "manufacturer" is reinforced by long legislative action and by long acquiescence therein by the persons and corporations affected.

Counsel for defendant company, in their very able and ingenious brief, say:

"A number of cases have passed upon the question of whether an electric light company was or was not a manufacturer. Some decisions have been adverse, but the greater number have been in our favor."

In other words it is a debatable question whether an electric light company is a manufacturer. Conceding, for the sake of the argument, that defendant company does manufacture electricity and light, the next question for solution is whether a producer of that kind of energy is a "manufacturer" in the sense of article 229 of the Constitution. In the legislative history of Louisiana the term "manufacturer" has never been applied to a gas, water, or electric corporation. Section 683 of the Revised Statutes of 1870 speaks of "manufacturers" of cotton, woolen, linen, silk, hempen cloth, and cordage, and of the "manufacture" of iron and other metals and things. It authorized the formation of corporations for the purpose of manufacture and for many other purposes, including the construction and operation of works to supply cities and towns with gas or water. As amended and reenacted by Act No. 154, p. 288, of 1902, the words "manufacture" is used in the same restricted sense, and is not applied to works of public utility to supply cities and towns with water, electricity, gas, or fuel oil. There is no reason of public policy for exempting light companies from taxation and at the same time denying exemption to other corporations exercising similar franchises in the interest of the public.

In *Commonwealth of Pennsylvania v. Northern Electric Light & Power Company,* 22 Atl. 839, 14 L. R. A. 107, the Supreme Court of the State *held* that, while the defendant company might technically be considered a manufacturer of electricity and light, it was not a "manufacturing corporation" in the sense of statute exempting the stock of such corporations from taxation.

Defendant's claim of exemption is at least doubtful, and therefore cannot be allowed.

Judgment affirmed.

SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. HOWELL.

Georgia Supreme Court — Feb. 21, 1906.

124 Ga. 105, 53 So. 577.

1. SHOCK FROM SAGGING TELEPHONE WIRE IN STREET — DECLARATIONS. — Where a declaration alleged that a telephone company, in stretching wires along a public street of a city, permitted one of them to sag while heavily charged with electricity, or to become so charged with electricity while thus sagging, at a place where it was likely to injure pedestrians, and gave no warning of the danger arising from such charge, in consequence of which a person walking along the street came in contact with the wire and was seriously injured by the electric charge, this sufficiently stated a case of negligence on the part of the defendant to withstand a general demurrer.
2. SAME — CONTRIBUTORY NEGLIGENCE. — Where a declaration alleged that a pedestrian was going along a street and started to cross it, when he was struck in the face by a wire which a telephone company had negligently allowed to sag while highly charged with an electric current, or to become so charged while sagging, without giving warning of the danger, and that while seeking to guard his face from the wire, the plaintiff's hands came in contact with it and was injured by reason of the electric current, and that he was without fault or negligence in and about the transaction, and was in the exercise of due caution and diligence, a general demurrer, on the ground that the plaintiff was not in the exercise of ordinary care and prudence for his own protection, and that by the exercise of such care he could have avoided the injury, was properly overruled.

(Syllabus by the Court.)

Error by defendant from judgment for plaintiff. *Affirmed.*

Statement of facts by LUMPKIN, J.:

Mot Howell, by his next friend, brought an action for damages against the Southern Bell Telephone & Telegraph Company, alleging, in substance, as follows: The agents and employees of the defendant were engaged in stretching wires on the arms at the top of certain poles situated on a public street of the city of Rome. There was a windlass under the charge of one of the defendant's servants, from which a wire was run to the cross-arm of a pole. The wire sagged from the pole to the windlass. The plaintiff was going along the street and started to cross it. The wire struck him in the face. He threw up his hand to get it out of the way, and caught hold of it with his right hand. He was unable to turn loose, and was seriously burned and injured. He was without fault or negligence in or about the transaction, and was in the exercise of due care and diligence. The defendant was negligent in allowing and permitting its wire to sag, when heavily charged with electricity as it was, and in permitting it to be or become charged with electricity while it was thus sagging on a public street, where it was likely to injure pedestrians, and in not notifying plaintiff that to touch the wire was dangerous,

and that it was charged with electricity. The defendant demurred to the petition, on three grounds: (1) That it set forth no good cause of action, (2) that it showed that the plaintiff was not in the exercise of ordinary care and prudence for his own protection; and (3) that in the exercise of ordinary care and prudence the plaintiff could have avoided the injury. The demurrer was overruled, and the defendant excepted.

Hunt, Chipley, McKenny & Maddox, for plaintiff in error.

Seaborn & Barry and *Wright, Lipscomb & Willingham,* for defendant in error.

Opinion by LUMPKIN, J.:

1. There was no special demurrer for want of sufficient fullness in any particular allegation; but the demurrer filed was general in its nature. As against such a demurrer the petition stated a good cause of action. An allegation that a telephone company while engaged in stretching wires along a public street of a city permitted one of them to sag while charged with electricity, or to become heavily charged with electricity while thus sagging, at a place where it was likely to injure pedestrians, and gave no warning of the danger arising from such charge, sufficiently stated a case of negligence to withstand the demurrer. See *Jones v. Finch,* 8 Am. Electl. Cas. 497, 128 Ala. 217, 29 So. 182; *Haynes v. Raleigh Gas Co.,* 5 Am. Electl. Cas. 264, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; *Ahern v. Oregon Tel. Co.,* 4 Am. Electl. Cas. 349, 24 Or. 276, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635; *Devine v. Brooklyn Heights Co.,* 6 Am. Electl. Cas. 318, 1 App. Div. 237, 37 N. Y. Supp. 170; *Texarkana Gas & Elec. Co. v. Orr,* 5 Am. Electl. Cas. 272, 59 Ark. 215, 27 S. W. 66, 43 Am. St. Rep. 30; *Burns v. Delaware & Atlantic Tel. Co.,* 70 N. J. Law, 745, 59 Atl. 220, 592, 67 L. R. A. 956. The decision in *Read v. City & Suburban Ry Co.,* 110 Ga. 165, 35 S. E. 170, is in harmony with that here made. There the plaintiffs, while driving along a street, were injured by a wire which sagged from the poles of a street railway company. The presiding judge granted a nonsuit, on the ground that they could have avoided the result of the negligence of the defendant, by the exercise of ordinary care; but this judgment was reversed. On a second trial there was evidence to show that as the vehicle was approaching the sagging wire, the employees of the company gave to the occupants repeated warnings of the danger ahead, which

were either unheard or ignored, and that these warnings were such as necessarily to have attracted the attention of an ordinarily prudent man. The jury found for the defendant, and the judgment was affirmed. *Read v. City & Suburban Ry. Co.,* 115 Ga. 366, 41 S. E. 629.

2, 3. It is not negligence, as a matter of law, for a pedestrian to cross a public street at a point where there is no cross-walk. In doing so he may "assume a greater risk from passing vehicles and animals using the main thoroughfare than he does when passing over a crosswalk (*Brunswick Ry. Co. v. Gibson,* 97 Ga. 489, 25 S. E. 484), but he does not in doing so assume any greater risk from obstructions other than those necessary for the use of some public utility, such as water plugs, telegraph and telephone poles, and the like. Even a telegraph or telephone wire, placed so low on a sidewalk or street that a person using the street might come in contact with it, would be an obstruction," *City Council of Augusta v. Tharpe,* 113 Ga. 158, 38 S. E. 389. In *City of Denver v. Sherret,* 88 Fed. 235, 236, 31 C. C. A. 499, it was said:

"The use of the public streets, between crossings is not limited solely to animals and vehicles, but may be used by footmen, due caution being exercised. Elliott, Roads & S. 622; *Moebus v. Herrmann,* 108 N. Y. 349, 15 N. E. 415, 2 Am. St. Rep. 440."

This case differs from those cited on behalf of the plaintiff in error. Thus, in *City of Coumbus v. Griggs,* 113 Ga. 597, 38 S. E. 953, 84 Am. St. Rep. 257, a street was rendered unsafe by reason of certain work which had been done on it. Two persons, with full knowledge of the situation, which was palpably and obviously dangerous, undertook at night to drive over the place where the street had been worked. They not only knew of the situation and danger, but discussed it a few moments before the catastrophe happened. In *Barfield v. So. R. Co.,* 118 Ga. 256, 45 S. E. 282, plaintiff's own evidence showed that he undertook to drive under a low trestle with which he was perfectly familiar, and to avoid injury by crouching in his wagon. His mules became frightened and made a lunge, which threw him upward, and he was hurt. None of the other decisions relied on by the plaintiff in error were in cases similar to that at bar. The plaintiff alleged that he was without fault or negligence in the transaction,

and was in the exercise of due care and diligence; and upon general demurrer we cannot declare that this was untrue. There are no facts set out in the declaration which disprove the statement. *Dempsey v. Rome,* 94 Ga. 420, 20 S. E. 335; *Central R. Co. v. Weathers,* 120 Ga. 475, 477, 47 S. E. 956; *Seaboard Air-Line Railroad v. Pierce,* 120 Ga. 230, 47 S. E. 581; *Hudgins v. Coca-Cola Bottling Co.,* 122 Ga. 699, 50 S. E. 974.

Judgment affirmed. All the justices concur.

SMITH v. MILWAUKEE ELECTRIC RAILWAY & LIGHT CO.

Wisconsin Supreme Court — Feb. 23, 1906.

127 Wis. 253, 106 N. W. 829.

1. DEATH OF LINEMAN — RELIANCE ON DECLARATIONS OF SUPERINTENDENT — CONTRIBUTORY NEGLIGENCE. — In an action for the death of a lineman caused by a shock from an electric wire of the defendant, *held,* that if the deceased had been informed by defendant's superintendent that the power would be turned off, he had a right to assume that the wires were not charged, and he was not guilty of contributory negligence in coming in contact with them.
2. SAME — EVIDENCE — CONFLICT — QUESTION FOR JURY. — Where the evidence as to defendant's negligence in not properly insulating wires and permitting them to be grounded was conflicting it presented a question for the jury.
3. APPEAL — EXCLUSION OF EVIDENCE. — Where evidence of a conversation informing decedent that wires would be safe was excluded, and on appeal it was contended that the exclusion was rendered harmless by evidence of a subsequent conversation informing decedent that the wires were dangerous, *held* that, if there was a dispute as to decedent's hearing the latter conversation, the error was not cured.

Reliance upon Foreman's Assurance. — An experienced lineman felt a current of electricity in a wire and informed the foreman of his squad of its dangerous condition. The foreman thereupon felt of the wire and pronounced it safe. The lineman took hold of the wire again, and again felt the current, but said no more to the foreman, and kept at work until he received a severe shock and injury. It was held that he had no right to rely on the foreman's assurance. *Epperson v. Postal Telegraph Cable Co.,* 7 Am. Electl. Cas. 736, 155 Mo. 346, 50 S. W. 795, 55 S. W. 1050.

Other cases in this volume relating to employees relying on assurance of a foreman. *East Tennessee Telephone Co. v. Carmine, post; Keeley v. Boston Elevated Ry. Co., post; Cumberland Telephone & Telegraph Co. v. Grave's Adm'x et al., post.*

Appeal by plaintiff from a judgment in favor of defendant. *Reversed.*

Statement of facts by SIEBECKER, J.:

Plaintiff, as administratrix of the decedent's estate, brings this action to recover the damages resulting from his death, which is alleged to have been caused by the negligence of the defendant. It is alleged that John J. Smith, the deceased, was in the employ of the defendant on July 20, 1904, and that, while in the discharge of his duties, he came in contact with a live electric wire of defendant's electric light plant in the city of Racine, and that an electric current of strong potentiality was thereby caused to pass through his body and that this resulted in his immediate death. Negligence is charged upon two grounds: (1) That the copper wires charged with an electric current of high voltage, "were negligently and improperly maintained (as part of said plant) by the said defendant, in that the insulation thereof was defective, faulty, worn, and insufficient, as the defendant well knew or should have known; and, (2) furthermore, in that the said wires did not constitute a perfect and distinct circuit well and safely insulated from the earth, but had been allowed by the negligence of the defendant to become connected with the earth, thereby causing what is known as a 'ground,' as defendant well knew or should have known in the exercise of ordinary care. That the said ground was a hidden defect highly dangerous to any person who might be upon the said pole; the means of knowledge thereof being entirely within the control of defendant." It is claimed that for these reasons the place upon the pole where the decedent worked was rendered an unsafe place, and the pole and wires were unsafe and dangerous appliances. Defendant denies the negligence charged and alleges contributory negligence on the part of the decedent. It appears that on the day in question, the decedent, in the course of his employment as lineman, worked upon one of the poles of defendant's plant, under the direction of the superintendent of the company, and that while so engaged in his work he was killed in the manner above described. The pole in question had several cross-arms, to which wires were attached; the upper ones sustained telephone wires, while the lower ones carried electric light wires. At the time of the accident, decedent had rested his weight on the fifth cross-arm from the top and was working on the wires above the fourth cross-arm. In doing this work, his body came in contact with a live wire on the fourth cross-arm and from it came the electric current which resulted in his death. The decedent had worked for a number of years prior to the accident as a lineman on electric plants. On cross-examination, plaintiff sought to elicit evidence of a conversation between the decedent and an officer of the defendant, part of which had been introduced by the defendant, as to a shutting off of the current while the work on the pole and the wires in question was being done. The court refused to receive this evidence and also excluded it on rebuttal as being irrelevent and immaterial. At the conclusion of the introduction of the evidence, defendant moved for the direction of a verdict in its favor. The court so directed a verdict, upon the ground, among others, that the evidence showed that the decedent was sufficiently warned of the dangers incident to his employment and that he therefore assumed the risk. Judgment was awarded dismissing the complaint and for costs. This is an appeal from such judgment.

Wallace Ingalls (*Fish & Storms*, of counsel), for appellant.

Kearney, Thompson & Meyers and *Clarke M. Rosecrants*, for respondent.

Opinion by SIERECKER, J.:

The evidence adduced shows that the decedent was an experienced lineman and had knowledge of the dangers commonly incident to such employment in working in proximity to live electric wires of high potentiality. It appears that a conversation which he had on the morning of the day of the accident at the power house with the superintendent in the presence of other workmen was partly elicited upon direct examination of some of defendant's witnesses. So far as shown, it was to the effect that the superintendent apprised decedent that in doing the work on the pole in question he must look out for and guard against the live wires carried on the cross-arms of the pole. Upon cross-examination of these witnesses, plaintiff's counsel propounded an inquiry as to whether the decedent in this conversation requested the superintendent to shut off the current while he performed the duties assigned to him at the point in question. Plaintiff also offered to prove all of this conversation in rebuttal of defendant's claim — to which proof was admitted — that decedent was fully warned of the danger, namely, that these wires were charged with a high potential current. It is claimed that if the whole conversation had been admitted, it would have tended to show that the decedent was informed by the superintendent that the current would be shut off. If the superintendent so informed him, it seems quite clear that it would have been very material on the question of decedent's contributory negligence. For if he was so informed he had a right to assume that the wires were not charged with electricity at the time he worked among and on them and he would not be guilty of a want of ordinary care in coming in contact with them as he did. The fact, which appears in evidence, that in the forenoon of the day the current was cut off to enable the decedent and other linemen to repair the wires, lends emphasis to the importance of this evidence as tending to show that he was free from contributory negligence, and that he had a right to assume that the current had been cut off. The trial court ruled that the decedent was sufficiently warned of the danger

and that he assumed the risk incident to it, and that therefore no actional negligence was shown. It is manifest from the record that the verdict was directed upon the ground that, under the facts and circumstances disclosed by the evidence, it conclusively appeared that decedent had assumed the risk of all dangers incident to the alleged negligence. As above indicated, this is erroneous if he had been informed or was led to believe that the current would be cut off the wires with which he came in contact. The evidence, as to defendant's negligence in the respect charged, is in conflict and permits of different reasonable inferences in support of the claims of either party, and it therefore presents a question to be determined by a jury. *Beyer v. St. Paul Fire & Marine Insurance Company,* 112 Wis. 138, 88 N. W. 57; *Zentner v. Oshkosh Gas Light Co.* (decided November 15, 1905), 9 Am. Electl. Cas. —, 105 N. W. 911.

The ruling above complained of was erroneous upon a well-established rule as to the competence and materiality of evidence, namely, that all parts of a conversation, if material to the issues litigated, may properly be offered by either party as a matter of right, and "each party may give his version of a conversation, and if one gives a part sufficiently complete to be material to the case, the other has the right to prove the balance. That, of course, he may do by cross-examination, or by other witnesses." *Fertig v. State,* 100 Wis. 301, 75 N. W. 960, and cases cited; *Garvin v. Gates,* 73 Wis. 513, 41 N. W. 621; *Hupfer v. National Distilling Company* (decided herewith), 106 N. W. 831. The respondent contends that these rulings of the court cannot be regarded as prejudicial, because, after the alleged conversation at the power house, at a meeting of the superintendent and the decedent in the street near the pole on which the accident occurred, the superintendent informed him as he was ascending the pole that the wires were charged with an electric current, and that he must look out for this danger. It is true that defendant's witnesses testified to this effect, but it also appears by the evidence of the witness Randall, who worked with decedent and was at the foot of the pole where this conversation is claimed to have occurred, that in speaking, the superintendent addressed him and not the decedent, and that decedent had then ascended the pole to such a height that on account of noises he probably did not hear

what was said, and that he did not thereafter communicate to the decedent anything said by the superintendent. Under these circumstances, it cannot be said that it appears without dispute that the decedent was warned that the wires were charged with an electric current. The exclusion of this evidence was prejudicial and necessitates a retrial of the case.

The judgment is reversed, and the cause remanded for a new trial.

CARROLL v. GRAND RONDE ELECTRIC CO.

Oregon Supreme Court — Feb. 27, 1906.

4 St. Ry. Rep. 908, 47 Ore. 424, 84 Pac. 389.

1. ELECTRICITY — NEGLECT OF BROKEN ELECTRIC WIRES. — Permitting a wire, charged with 23,500 volts of electricity, to remain for about twenty hours fastened to a picket fence beside a public highway, in such a condition that any living creature coming in contact with such wire must necessarily suffer death, affords *prima facie* evidence of negligence.
2. SAME — CONTRIBUTORY NEGLIGENCE IN GOING NEAR BROKEN WIRES, AFTER WARNING, TO SEE IF STILL CHARGED. — Where a person twenty-four years old had been warned to keep away from a broken wire, which was heavily charged with electricity, and one end of which had been fastened around a picket fence, but, concluding to ascertain whether or not the broken wire was still charged with electricity, he seized the top of one of the fence pickets with his left hand and pointed his index finger toward the wire, which was about eight inches distant, when there was a sudden flash, burning his hand and killing him, he was guilty of contributory negligence, as matter of law, defeating his right to a recovery.
3. ASSUMPTION OF RISK. — The law does not recognize a distinction between

a private corporation, to recover damages resulting from his death, which is alleged to have been caused by its negligence in constructing lines of electric wires and in failing to repair such wires when broken. The answer denies the material averments of the complaint, and, for a further defense, alleges that Carroll's death ensued from his own carelessness. The allegations of new matter in the answer were put in issue by the reply, and at the trial, the plaintiff having introduced her testimony and rested, the court, on motion of defendant's counsel, gave a judgment of nonsuit, and she appeals.

Leroy Lomax and *Gustave Anderson,* for appellant.

T. H. Crawford, for respondent.

Opinion by MOORE, J.:

The bill of exceptions shows that the defendant operates at Cove a power plant, where it generates electricity, which is transmitted on overhead wires seventeen miles westerly to La Grande at a pressure of 23,500 volts, and by a branch from the main line, starting at a point about five miles from Cove, is carried a current at the same voltage southerly eight miles to Hot Lake and supplied from substations at both termini to customers who use it for light, heat, or power. The injury complained of occurred on the branch line where it runs south on the west side of a public highway extending through the farm of Frank Hempe. This line consists of three uninsulated wires, one of which is suspended from the tops of poles about thirty feet high, set about 125 feet apart, and the other wires are attached, each to the end of cross-arms fastened to such poles near the top.. A very severe wind arising, Sunday, August 27, 1905, at about 4 o'clock in the afternoon, blew a green limb from a tree growing on Hempe's land across the wires, causing two of them to burn off and fall, so that the ends thereof, in the direction from whence the current came, lodged, one against the pole by which it was suspended, and the other on the ground, where it emitted sparks, setting fire to dry leaves; and, some cattle being near, John W. Minnick, who with his employees was threshing grain for Hempe, apprehending danger, by using a dry stick, looped the wire over the end of a picket in a fence inclosing a lawn about Hempe's house, pushing the noose down against the upper rail of the palings. The loop placed over the picket not appearing to be securely fastened, Minnick bent the wire more, still using the dry stick for that purpose, and, wondering whether it still possessed electrical

energy, he put out his finger, and when it came within about eight inches of the wire a blaze suddenly appeared, burning his hand and causing him to fall insensible, from the effects of which shock he did not fully recover for several days. Minnick's son, seeing his father fall, immediately ran to his assistance, when, coming in contact with the wire that was lodged against the pole, he also received a shock. Soon after the wires fell, a dog chasing cattle away from the place of danger also came in contact with the electric current. When the end of the wire was fastened to the fence, Hempe's son George was present and knew that the several shocks were so received. Leonard Carroll, who was 24 years old, was working in August, 1905, for Hempe as a farm laborer. He was not at the home of his employer, however, when the wires fell; but, returning that evening, he ate supper with the family and also breakfast the next morning, at which meals the dangerous condition of the wires was freely commented upon, the several shocks received therefrom were adverted to, and at breakfast Hempe, in his hearing, warned the persons participating in the repast to keep away from the broken wires, as by approaching them they might be killed. Carroll assisted that forenoon in hauling oats from Hempe's field to Minnick's machine to be threshed. About 12 o'clock that day, as George Hempe, who was nearly Carroll's age, was returning to the house for the midday meal, he concluded to ascertain whether or not the broken wires, which had not been repaired, were still charged with electricity, and going inside the inclosure to the place where the end of the wire

broken wires. On cross-examination George stated that he told Carroll about Minnick's getting shocked and knocked down, whereupon defendant's counsel, referring thereto, inquired: "Did you tell him he put his hand up towards the wire and there was a blaze came out to him, and that is the way he got it?" To which the witness replied: "Yes; I think I told him something to that effect." Referring to the manner in which Carroll was injured, the witness was further asked on cross-examination: "Isn't it a fact that he went up and took hold of the picket there and stuck his finger out in that way?" And he answered: "Well, when he took hold of the picket, he reached out and took hold of it like that, and these three fingers closed while the other extended. Q. Extended out towards the wire? A. Yes. * * * Q. Well, now, did his hand come in contact with the wire? A. I don't think it did. The last time I saw it before the blaze started, it was probably about eight inches from the wire, and after the blaze started I could not say. * * * Q. As a matter of fact, from where he took hold of that picket here, his finger — his forefinger of his left hand — was pointed directly towards the wire, wasn't it? A. Yes." Frank Hempe, as plaintiff's witness, testified that he was not at home when the wires burned off, but that he returned that night about 8 o'clock. In referring to the broken wires at that hour, plaintiff's counsel inquired: "What did you see about that?" And the witness answered: "Well, they were sparking and I cautioned the people that they were dangerous and to keep away from those wires. * * * Q. You saw the wires? A. I didn't see any wire. I saw the fire and sparks. I didn't see any wire. I thought it was dangerous." On cross-examination, defendant's counsel, referring to Monday, August 28, 1905, inquired: "I will ask you to state whether or not, at the breakfast table that morning, when Mr. Leonard Carroll was present and your son George, that you said to all of those parties to stay away from that wire; that it was extremely dangerous, and they might get killed?" To which he replied: "Yes." Mrs. Frank Hempe, as plaintiff's witness, testified, on cross-examination, that Leonard Carroll took supper with her family Sunday evening, August 27, 1905, when the breaking of the wires was discussed; that at the breakfast the next morning, when Carroll was present, the broken wires were again the subject of

debate, and attention was called to Minnick's being knocked down; that she heard her husband say, at that meal, in the presence of Carroll, and of her son George, to stay away from the wires, for if they went about them they were liable to be killed. The witness, referring to what was further observed on that occasion, testified as follows:

"I said the best thing to do was to keep away from that wire. Q. Mr. Leonard Carroll was there at that time? A. Yes. Q. Was that at the breakfast table or the supper table? A. Breakfast table. Q. Well, these matters were talked — were made a matter of general conversation — were they not, between the parties at the supper table and brakfast table? A. Yes. Q. And to what extent Mr. Minnick had got hurt? A. Yes. Q. And that it was fortunate that he didn't get killed and matters of that kind? A. Yes. Q. And it was discussed how dangerous it would be if a person happened to get near the wire, if it happened to be charged with electricity? That was all talked, wasn't it, Mrs. Hempe? A. Yes."

Though no testimony was introduced on the part of the defendant, the answer states facts which were evidently relied upon to excuse the delay in failing to discover the break in the wires, so that it might sooner have been repaired. That pleading details the manner in which the defendant's station, substations, and transmission lines are constructed, maintained, and operated, and avers that the power plant, at the time of the wind storm adverted to, was supplied with the latest and best improved electrical devices for promptly detecting any grounding of the wires. That at the time the wires were burned off at Hempe's farm a tree fell upon the main line at a point about four miles east of La Grande, breaking the wires, the grounding of which simultaneously at each place was immediately indicated at the station at Cove, whereupon the plant was instantly shut down. That the break in the main line was soon thereafter located and about midnight repaired, when the electric power was applied at Cove and "tested out clear" on the transmission lines, owing to the fact that, at Hempe's farm, the end of the broken wire had been placed on the dry picket fence, thereby producing such insulation as to prevent the grounding of the current at that place, and thus rendering it impossible to detect a break in the wires at the power station. That at Hot Lake the electric substation is automatic in its operation, requiring only occasional attention to insure its efficiency, and on August 28, 1905, an employee of the defendant going to that place discovered that two of the wires leading thereto were

"dead," indicating a break therein on the branch line, and immediately telephoned the person managing the power plant, who instantly stopped the machinery in order that the necessary repairs might be made. In a few minutes thereafter the defendant was notified by telephone that a man had been killed at Hempe's farm, by coming dangerously near or in contact with a broken wire; such person proving to be plaintiff's intestate.

The care which the law exacts from any person, firm, or corporation, engaged in operating an instrumentality is always in proportion to the degree of danger reasonably to be apprehended from the use of the means employed. Electricity is a natural force, the power of which is fully comprehended only by experts, who may be aware of the measure applied, and, when such instantaneous energy is transmitted, either in large quantities or at high voltage, the wires conducting it should be placed and kept beyond the reach of common people who have no conception of the extreme danger to which proximity to, or contact therewith will necessarily expose them. This danger is augmented by the falling of electric wires in places of common resort, and the peril is enhanced by the length of time the wires remain down in such localities. Without attempting to discuss the defendant's alleged excuse for its failure sooner to discover the break in the wires on the branch line, we shall take for granted that permitting a wire charged with 23,500 volts of electricity to remain, for about twenty hours, fastened to a picket fence, beside a public highway, in such a condition that any living creature coming in contact with such wire must necessarily suffer death, affords *prima facie* evidence of negligence. *Boyd v. Portland General Electric Co.*, 7 Am. Electl. Cas. 661, 40 Ore. 126, 66 Pac. 576, 57 L. R. A. 619; *Haynes v. Raleigh Gas Co.*, 5 Am. Electl. Cas. 264, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786.

Having assumed, without deciding, that the defendant's want of ordinary care in failing sooner to repair its branch line was the primary cause of the injury complained of, it remains to be seen whether or not the testimony introduced by the plaintiff shows that Leonard Carroll was also guilty of negligence contributing to his death. It has been repeatedly held in this State, in actions to recover damages resulting from a personal injury, that, if it appears from the testimony offered by the plaintiff,

that the person sustaining the hurt was also guilty of negligence, without which the injury complained of would not have happened, such proof, as a matter of law, will defeat a recovery. *Tucker v. N. P. Terminal Co.,* 41 Ore. 82, 68 Pac. 426; *Massey v. Seller,* 45 Ore. 267, 77 Pac. 397; *Abbott v. O. R. & N. Co.* (Ore.), 80 Pac. 1012. In *Anderson v. Jersey City Elec. Light Co.,* 7 Am. Electl. Cas. 557, 64 N. J. Law, 665, 46 Atl. 593, 48 L. R. A. 616, 81 Am. St. Rep. 504, the plaintiff, desiring to convince a companion that an electric wire was so insulated that no injury could result to a person by coming in contact with it, deliberately touched the wire to make the demonstration, when he received a severe shock, seriously injuring him. In an action to recover the damages sustained, a judgment of nonsuit was rendered, in affirming which, Mr. Justice GUMMERE, referring to the plaintiff, says:

> "He knew that the wire might be dangerous if the insulation was not perfect, and, having voluntarily assumed the risk of injury in order to vindicate the soundness of his judgment, he has no one but himself to blame for the consequences which followed."

So, too, in *Wood v. Diamond Electric Co.,* 185 Pa. 529, 39 Atl. 1111, a person having been killed by coming in contact with a wire screen charged with electricity, which screen was used to protect glass in a photographic gallery from breaking, the plaintiff's intestate, to demonstrate to the multitude assembled in consequence of the death, that the shield was not laden with electricity, voluntarily touched it, causing his death also. An action

answer that the electric current was not turned on until about 12 o'clock that night. It will also be kept in mind that this witness, on Monday morning, in the presence of Carroll, warned all persons at the breakfast table to keep away from the broken wires, saying they were extremely dangerous, and that by coming in contact with them death might ensue. Mrs. Hempe, also, in Carroll's hearing, reiterated the warning. It must be assumed that Carroll knew that, if he approached the broken wires, so as to come in contact with them, danger was imminent. Though Carroll was not present when the wires burned off Sunday evening, he must have known the manner in which Minnick received the shock that prostrated him on that occasion, for George Hempe testified that he told Carroll that Minnick put his hand out towards the wire. Notwithstanding Carroll's knowledge of the dangerous condition of the broken wires, and the warnings given by Mr. and Mrs. Hempe to keep away from the place where he was injured, he evidently concluded to make the same experiment that Minnick tried, and, in doing so, he was killed.

It is argued by plaintiff's counsel that the law recognizes a distinction between knowledge of the condition of an instrumentality and recognition of the risk incident thereto; and, this being so, though Carroll may have known that to approach the broken wire was hazardous, the court, in the absence of any testimony tending to show that he was aware of the peril to which he was exposed, erred in concluding, as a matter of law, that his death was caused by his contributory negligence. The legal principle involved has been established as a rule in this State. *Roth v. N. L. Lumber Co.*, 18 Ore. 205, 22 Pac. 842; *Johnston v. Oregon Short Line*, 23 Ore. 94, 31 Pac. 283; *Viohl v. N. P. Lumber Co.* (Ore.), 80 Pac. 112. These cases were actions instituted by servants against their masters to recover damages for personal injuries received while engaged in the performance of duties devolving upon the plaintiffs, respectively. The rule thus recognized is based upon the theory that, though a servant may have knowledge of the dangers incident to his employment, if the service required of him demands a speedy performance, such haste will excuse his temporary lapse of memory in failing to take cognizance of the peril to which he is exposed. *Giraudi v. Electric Imp. Co.*, 5 Am. Electl. Cas. 318, 107 Cal. 120, 40 Pac. 108, 28 L. R. A.

596, 48 Am. St. Rep. 114. In the case at bar the relation of master and servant did not exist between Carroll and the defendant company, nor, so far as we are able to discover from the bill of exceptions, was there any necessity compelling him to approach the broken wires, nor any circumstances that induced him for an instant to become oblivious to the peril that might be produced from contact with them. The rule invoked cannot therefore have any application to the facts involved.

It will be borne in mind that Carroll was twenty-four years old at the time he received the fatal shock, and his age precludes the application of the prevailing rule as to the liability of railroads for injuries sustained by children while playing on turntables, or for hurts sustained by persons of immature years from other instrumentalities which they, by the carelessness of others, are permitted to approach. Carroll probably did not know that the wires transmitted such a high voltage of electricity. He had been employed at Hempe's farm about a month prior to his death, and, having frequent opportunity to observe the condition of the wires, he must have known that they were uninsulated, and were used for supplying electricity for lighting purposes. As he must have been aware of these facts, he ought also to have known that contact with a wire, transmitting sufficient electricity for general illumination, was extremely dangerous, and he should have accepted the advice of Mr. and Mrs. Hempe and remained away from the broken wires. Instead of obeying these warnings, he evidently, like Minnick, desired to see how near the wire he could place his finger without sustaining a shock, and his hand coming in contact with the wire or within its danger zone, he was killed.

We think his act in this respect shows such contributory negligence as to prevent a recovery of the damages sustained, and hence the judgment is affirmed.

ON REHEARING.

In a petition for a rehearing, plaintiff's counsel, invoking the rule that on a motion for a judgment of nonsuit all reasonable presumptions and every legitimate inference that can arise from the evidence should be invoked in favor of the party bringing the action, so as to carry the case to the jury, insist that this court, in reviewing the testimony given at the trial, improperly considered

parts thereof and omitted other material parts, to the injury of their client. The principal objection is made to a statement contained in the opinion to the effect that Leonard Carroll pointed his finger at the wire when he was killed.

A re-examination of the bill of exceptions shows that George Hempe, as plaintiff's witness, testified that Carroll went with him to the picket fence, knowing that the witness was going to test the wire to determine whether or not it was still alive. Hempe further testified that the wire was broken about twenty-five feet from the pole and extended from the picket to which it was fastened northerly up to the insulator by which it was suspended, and that the pole referred to stood in the public road about six or eight feet east of the picket fence. In answer to the question: "How was the wire with reference to being down even with the fence or above or below? What was the relative position of the wire along there?" the witness replied: "To my remembrance the wire was about that high from the picket. [About five or six inches. — Reporter.]" Plaintiff's counsel, referring to Carroll, inquired: "You say he took hold of one of the pickets with his left hand?" and Hempe answered: "Yes. Q. About what distance was it back where he took hold of the picket from the end of the wire that was hanging on the picket? A. Well, I think it was about two feet or thereabouts. Q. Then how far was the wire that was suspended along in front of the pickets? How far in front of his hand was the body of the wire along there, if you know? How close was his hand to it? A. Well, probably about eight inches from the wire. Q. In other words, the wire just passed by his hand towards the end of it? A. Yes. Q. Where were you testing it with the stick? A. At the end of the wire. Q. And he was standing at the north side of you, was he? A. Yes." The upper end of a picket, cut from the fence above the top stringer and supposed to be the one Carroll grasped, was identified by the witness, offered in evidence, and sent up as an exhibit. This part of the picket is tapered wholly on one edge so that the apex is in line with the opposite side.

Defendant's counsel, referring to the manner in which Carroll was injured, inquired: "Isn't it a fact that he went up and took hold of the picket there and stuck his finger out in that way? A. Well, when he took hold of the picket, he reached out and took

hold of it like that, and these three fingers closed while the other extended. Q. Extended out towards the wire? A. Yes. Q. Now, when you saw that finger sticking out there, at that instant you saw the flash from the wire to his finger, didn't you? A. Yes — not at that instant exactly, but a very short time until the electricity made the circuit. * * * Q. When he took hold of the picket, was he turned looking towards you, or which way was he looking? A. He was looking almost straight ahead of him, I should think. * * * Q. Well, now, did his hand come in contact with the wire? A. I don't think it did. The last time I saw it before the blaze started, it was probably about eight inches from the wire, and after the blaze started I could not say. Q. You don't know whether his hand came in contact with the wire or not? A. I don't know. It didn't before the current started, and after the current started I could not say, there was such a bright blaze. Q. Now, George, isn't it a fact that he walked up there, and, when you were testing that matter, stepped across the ditch and simply reached out his hand towards that wire and received that shock? Isn't that a fact, George? A. No, sir; he put his left hand on the fence. Q. And stuck his finger out towards it this way? That is the way he did it, didn't he? A. I can show you with the picket. Q. Didn't he point his finger out towards the wire? That finger never closed. The other three fingers closed on the picket, and the fourth finger extended. Now, don't you know, as a matter of fact, that he was pointing his finger at the wire? A. No, I don't know it. Q. Well, why do

for if he was negligent in permitting such appliance to remain exposed. The law imposes upon a person *sui juris* the obligation to use ordinary care for his own protection, the degree of which is commensurate with the danger to be avoided. As danger from uninsulated wires is proportionated by the amount of electricity so transmitted, contact with such wires should be avoided when their existence is known. So, too, suspicion, entertained by a person of suitable age and reasonable discretion, that a fallen wire is charged with electricity, should induce him to shun, if possible, the surmised peril, for the rule of law is that one who voluntarily assumes a position of danger, the hazards of which he understands and appreciates, cannot recover for an injury from a risk incident to the position. *Fitzgerald v. Connecticut River Paper Co.*, 155 Mass. 155, 29 N. E. 464, 31 Am. St. Rep. 537; *Robinson v. Manhattan Ry. Co.* (Conn. Pl.), 25 N. Y. Supp. 91.

Leonard Carroll entertained a suspicion as to the danger that might result from contact with the broken wire, but he evidently did not know that, if it was "alive," it was so heavily charged with electricity that death would ensue if he came within the hazard belt. As he had been warned, however, of the danger by Mr. and Mrs. Hempe, informed by their son George that Minnick received a shock that prostrated him by putting his hand up "towards" the wire, and knew that a test was to be made to ascertain whether or not electricity was present, thereby imputing a suspicion of its existence, we think the testimony shows that he voluntarily assumed a position of danger, the hazards of which ought to have been known by a person of his age and discretion.

The petition is therefore denied.

MARTIN v. DES MOINES EDISON LIGHT CO.

Iowa Supreme Court — March 8, 1906.

131 Iowa 724, 106 N. W. 359

1. DEATH OF EMPLOYEE OF ELECTRIC LIGHT COMPANY FROM CONTACT WITH IRON ROD CONNECTED WITH SWITCHBOARD — EVIDENCE. — In an action against an electric light company to recover for the death of an employee

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Expert Evidence. — See note to *Citizens Telephone Co. v. Thomas, post.*

Care Required of Electrical Companies. — See note to *Guest v. Edison Illuminating Co., post.*

resulting from a shock received from an iron rod supporting the defendant's switchboard, evidence held sufficient to sustain verdict for plaintiff.

2. SAME — EVIDENCE — OPINION OF EXPERT. — In an action for the death of an employee from an electric shock, it was the theory of the defendant that death resulted from heart disease or other natural cause and not from an electric shock. It was held that the opinion of an expert, as to whether or not deceased received an electric shock before he fell, was inadmissible.

3. ELECTRICAL COMPANIES — CARE REQUIRED. — People producing or using electricity must exercise a high degree of prudence and watchfulness proportioned to the magnitude and subtlety of the peril to be guarded against.

Appeal by defendant from a verdict and judgment for plaintiff. *Reversed.*

Clark & McLaughlin and *James B. Weaver, Jr.*, for appellant.

Parrish, Dowell & Parrish and *Spurrier, Mills & Perry*, for appellee.

Opinion by WEAVER, J.:

The defendant is a corporation engaged in the business of operating a system of electric lights in the city of Des Moines, Iowa, and at the time of the accident of which complaint is made the intestate, William H. Bass, was a laborer in its employ. Among the furnishings of the plant was a device known as a switch board to which several wires bearing the electric current centered. This switch board was constructed of heavy marble slabs set upright in an iron frame, and rested upon the top of a brick wall built up for that purpose from the basement. To effect some contemplated change or improvement in the premises the company undertook to lift or raise the board about two inches. For this purpose a series of jackscrews was so adjusted below the board that, when operated together, the frame with the included slabs could be slowly and evenly raised to the desired position. To assist in this movement and to sustain the board in position, iron rods attached to the iron framework inclosing the marble slabs extended upward, passing through holes in a heavy beam or pole which had been suspended for that purpose from the steel truss supporting the roof of the building. The upper ends of these rods were fitted with iron taps or burrs, and as the jackscrews below slowly pushed the switch board upward these taps or burrs were screwed down, thus causing a portion of the weight to be

suspended from the pole. This work which we attempted to describe was done very slowly and occupied several days in its accomplishment. The method and manner of it is described at great length and with technical nicety in the testimony of the witnesses and restated several times in the arguments of counsel, but the foregoing abridgment we think is sufficient to give a fair idea thereof. To understand the nature of the alleged accident we must also refer, as briefly as possible, to the system of wiring by which in operating the light plant the current was brought to the switch board. To attempt to go into the minute details would be confusing, rather than enlightening, to the non-expert reader. It is enough to say that the wires extended from the dynamo to the back of the switch board, where by means of various devices the curernt was controlled and switched or distributed to the several service wires. The safety of persons engaged in this employment required the insulating of the wires and the prevention of any contact between an electric wire and the iron frame inclosing the switch board. When this was properly done, there was no danger of injury by electric shock to any one coming in contact with the switch board or frame. If, however, by carelessness or otherwise, the iron frame became charged with electricity, it was a source of danger to those employed about it, and if, under such circumstances, a person standing upon or being in touch with any ground connection should also come into contact with the frame, the current would instantly pass off through his person to his injury and possible death.

The evidence tends to show that during a part of the time in which the board was being raised the connection with the power was suspended at times; but on the day in question, one current, known as the "alternating current," was turned on with a voltage of about 2,300. So far as appears, no notice of the turning on of the current was given to the workmen. Bass, the plaintiff's intestate, had at this time been in the employment of the company for several months assisting generally as a common or unskilled laborer in making such repairs as were required upon and about the building. He was not an electrician and had no duties to perform in relation to the management and control of the electric current, and so far as appears from the record had no experience or expert knowledge in reference to such matters. On the day in

question it became his duty to attend to the turning of one of the iron taps or burrs at the upper end of the rods extending, as we have already described, from the iron frame of the switch board through the pole or beam suspended from the trusswork of the roof. For this purpose he ascended a ladder, carrying in his hand a wrench with which he began to turn the burr. While so engaged he reached up with his left hand and, evidently to assist in supporting himself on the ladder, took hold of an upright iron rod extending to the steel work supporting the roof. While in this position a peculiar sound attracted the attention of one Lynch, whose business it was to regulate the voltage, and looking up, he discovered Bass standing on the ladder stiff and rigid, with outstretched arms, and at once turned off the current, at which moment Bass fell to the floor dead. It is the theory of plaintiff that by the negligence of defendant the frame of the switch board and with it the iron rods by which its weight was suspended from the pole had become charged with electricity, and that when Bass, with one hand, brought the wrench in contact with the upper end of the suspending rod and with the other grasped the roof iron, a circuit was completed for the discharge of the electric fluid. It may also here be said that experiments made soon after the death of Bass tended to show that the roof iron which he grasped in his left hand did have a ground connection, and that, if we assume the correctness of the claim that the iron frame was charged with electricity, the plaintiff's theory of the cause and manner of the accident is fairly maintainable.

The plaintiff's petition charges the defendant with negligence by which the death of his intestate was occasioned: (1) In turning on or having on the current of electricity while Bass was employed in a place of danger; (2) in failing to notify Bass that the current was on; (3) in ordering Bass to tighten the burrs while a dangerous current was on; (4) in failing to instruct Bass as to the dangerous character of the work; (5) in allowing the switch board, frame, and rod to become charged with electricity; and (6) in failing to exercise proper care in the management and location of the wires and in insulating the same and in maintaining the insulation in proper repair, whereby the frame, rods, and bolts connected with the switch board became charged with a dangerous current of electricity. The answer of the defendant denies all the

plaintiff's allegations of negligence and alleges the fact to be that Bass was familiar with the operation of the electric light plant "and had long known the risk incident to the employment in which he was engaged and assumed all the risks in connection with such employment." There was a verdict and judgment against defendant in the sum of $5,000. Many errors are alleged as grounds for the reversal of the judgment, and to these, so far as is necessary for the disposal of the case, we hall now give attention, though not entirely in the order in which counsel have here presented them.

1. The court defined negligence to the jury as "the want or omission of reasonable care and diligence, the failure to do something which a reasonable person, guided by those considerations which ordinarily regulate the conduct of human affairs, under the circumstances would do, or the doing of something which such person under such circumstances, would not do." This instruction is criticised as an incorrect statement of the law because, counsel say, it makes the conduct of a "reasonable man," rather than that of a "reasonably careful and prudent man," the standard of due care. We may assume the correctness of counsel's conception of the law in this respect without accepting their conclusion. It is true the definition given by the court does not include the words "careful" and "prudent;" but, as we read it, the very thought contended for on behalf of the appellant is none the less clearly expressed. If one acts as a reasonable person, guided by those considerations which ordinarily regulate human conduct,

the same connection with the language criticised the court told the jury that the duty incumbent on the defendant was to use the reasonable care and diligence which an ordinarily careful and prudent person would exercise under the circumstances. As men of average intelligence, the jury must have understood from the instructions that, if defendant exercised reasonable care under all the circumstances for the safety of its workmen, it had discharged its full duty. The statement of the duty of the employer to furnish his employee a safe place to work is justified by the language of text-writers and courts without number; but it is a universally recognized proposition that when the employer has used all reasonable care and diligence in this respect, his duty is done, and that a place which has been furnished and equipped with such reasonable care is a "safe place to work" within the meaning of the law. For instance, in *Fink v. Ice Co.*, 84 Iowa 325, 51 N. W. 155, we quoted with approval from *Morton v. Railroad* (Mich.), 46 N. W. 113: "It is well settled by all the authorities that the master must provide his servant a safe place to work in." In *Mosgrove v. Zimbleman*, 110 Iowa 171, 81 N. W. 227, we said: "The mine owner was bound in the first instance to furnish a reasonably safe place to work and then to exercise ordinary care in so keeping it." In *Foley v. Packing Co.*, 119 Iowa, 246, 93 N. W. 284, we said: "That it is the rule of all the cases that the master must provide and maintain a safe place for his employees to work is well settled." The same rule in like or similar words has been announced in *Lewis v. Seifert*, 116 Pa. 628, 11 Atl. 514, 2 Am. St. Rep. 635; *Nadau v. Lumber Co.*, 76 Wis. 120, 43 N. W. 1135, 20 Am. St. Rep. 29; *Portance v. Lehigh C. Co.*, 101 Wis. 574, 77 N. W. 875, 70 Am. St. Rep. 932; *Prescott v. Engine Co.*, 176 Pa. 459, 35 Atl. 224, 53 Am. St. Rep. 683; *Elledge v. Railroad Co.*, 100 Cal. 289, 34 Pac. 720, 38 Am. St. Rep. 290; *Meier v. Morgan*, 82 Wis. 289, 52 N. W. 174, 33 Am. St. Rep. 39; *Greenleaf v. Railroad*, 29 Iowa 42, 4 Am. Rep. 181; *Coombs v. Cordage Co.*, 102 Mass. 572, 3 Am. Rep. 506; *Ill. Cent. R. R. Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593; *Ryan v. Fowler*, 24 N. Y. 410, 82 Am. Dec. 315; *Kirkpatrick v. Railroad*, 79 N. Y. 245; *Corcoran v. Halbrook*, 59 N. Y. 520, 17 Am. Rep. 369; *Railroad Co. v. Swett*, 45 Ill. 197, 92 Am. Dec. 206; and in many other decisions too numerous to men-

tion. The word "safe," as it is here used, and indeed in common parlance, does not mean a place so made and guarded as to exclude all possibility of danger. No amount of care, prudence, and foresight can produce or insure such a condition. Many employments are in and of themselves dangerous, and it involves no paradox to say that a place of danger may be "safe" in the proper sense of the word. It is "safe" when all the safeguards and precautions which ordinary experience, prudence, and foresight would suggest have been taken to prevent injury to the employee while he is himself exercising reasonable care in the service which he undertakes to perform. Such a place is reasonably safe, whether tested by the rule of law or by common sense, and such was the effect of the instruction given by the trial court.

But counsel say that Bass and his co-employees were engaged in a work of alteration and repair of the building and apparatus, and that "in such cases the employer is not required to use reasonable skill and care as in cases where the place or apparatus is completed and brought to perfection for the performance of the service." If we understand the proposition of counsel, it does not state the law. It is true that, if a servant is employed to make a dangerous place safe, he assumes the risk of the very danger which he undertakes to remove; for it is a danger which is naturally incident to his employment. So, too, if his work is of such nature as by its progress naturally creates a risk of injury, as if, for example, he is employed to tear down a building, or a toppling wall, or to excavate a gravel bank, and is thus exposed to danger from a fall of the overhanging material, this risk, for the same reason, imports no liability on the part of the master. If, therefore, in the present instance, the system of electric wiring or any other part of the apparatus connected with the transmission or control of the current had been known to be out of repair or dangerous of approach, and Bass, having knowledge that the wires were charged with electricity, had undertaken to make the changes or repairs necessary to remove the peril, the risk thus encountered would be his own. But the duty of the master not to expose the servant to any injury which may be reasonably anticipated and guarded against remains the same. As has been well said by the Supreme Court of Minnesota:

"There is no difference, as to the duty of the master and the assumption of risk by the servant, between an employment to make repairs and any

other employment. In all cases the servant is held to take on himself the risks necessarily incident to the employment, unless, perhaps, they be latent and known to the master, but not known to, nor by the use of proper diligence discoverable by, the servant; and in no case does he take on himself risks that arise by reason of neglects on part of the master, unless they be known to him or by the use of proper diligence are discoverable by him." *Hedden v. Railroad Co.* (Minn.), 20 N. W. 318.

Of course, if the nature of the repair be such that the danger of injury to the employee is enhanced, he will ordinarily be held to accept the enhanced risk, not because of any exception to the general rule, but because the essential principle of the rule requires it. The enhanced danger is a natural incident to the thing he undertakes to do. It is one of the "circumstances" which surround and characterize the service, and which the jury is always directed to take into consideration in reaching a verdict in this class of cases. Bearing on this discussion see, also, *Engstrom v. Ashland, I. & S. Co.*, 87 Wis. 166, 58 N. W. 241; *McCauley v. Norcross*, 155 Mass. 584, 30 N. E. 464; *Breen v. Field*, 157 Mass. 277, 31 N. E. 1075; *Railroad Co. v. Redeker*, 67 Tex. 181, 2 S. W. 513; *Railroad Co. v. Hester*, 64 Tex. 401; *Railroad Co. v. Naylon*, 17 Colo. 501, 30 Pac. 249, 31 Am. St. Rep. 335; *Meloy v. Railroad Co.*, 77 Iowa 743, 42 N. W. 563, 4 L. R. A. 287, 14 Am. St. Rep. 325. It would be a most unreasonable rule, if the act of a servant in undertaking an unusually dangerous service for the master should relieve such master from all obligations to exercise reasonable care for the servant's safety. The servant may properly be held to the risk of the extraordinary danger which is naturally incident to the extraordinary service; but he never takes the risk of the master's negligence under any circumstances, save when he knows of such negligence or as a reasonably intelligent person ought to have known of it and chooses to remain in the service.

3. In the seventh paragraph of the charge the jury were told that in respect to the charge of negligence against the defendant they could consider "only the negligence charged by the plaintiff in his petition, * * * and then only such negligence, if any, as was the proximate cause of the death of Bass." The correctness of this instruction is challenged, because, it is said, "the latter part of this instruction, when taken alone or as a part of the entire instruction, does not limit the jury to the alleged negli-

gence set out in the petition, and if the jury inferred or concluded that the defendant was negligent in any respect which was the proximate cause of the death of the deceased, under this instruction it would be warranted in returning a verdict for the plaintiff." The latter part of the instruction should have been worded: "And then only the alleged negligence, if any, as was the proximate cause of the death of the deceased." We confess ourselves utterly unable to find the distinction sought to be made between the instruction as given and as counsel would have it amended. If the charge that defendant can be held liable only for such negligence as is alleged in the pleadings, and then for only such negligence as the jury may find to be the proximate cause of the injury, is not it an explicit and sufficient direction that defendant must be held liable, if at all, for only such negligence as is alleged against it, and that, even as to the negligence so alleged, there is no liability unless the jury further find it to have been the proximate cause of the death of the deceased? It would be hard to devise a form of words to express the thought. It is rare that any two lawyers choose precisely the same language in which to express the same rule or principle on which they are entirely agreed, and in our judgment the form of expression adopted by the court, and that which is preferred by counsel are mere verbal variations in expressing the same thought. The same thing may be said to the objections raised to paragraph 9 of the charge. There was no error in either.

4. In the first paragraph of the charge the court told the jury that in order to recover damages the plaintiff must prove that defendant was negligent as charged; that the death of Bass was caused by such negligence; that Bass did not, by his own negligence, contribute to his injury; and that by reason of his death so negligently caused his estate had suffered damage, and that if each and all of these facts had been established a verdict should be returned in plaintiff's favor. This is said to be erroneous because of its omission to include any reference to the defendant's plea of an assumption of risk by the deceased, and in support of the objection we are cited to *Quinn v. Railroad Co.*, 107 Iowa 710, 77 N. W. 464, *Sankey v. Railroad Co.*, 118 Iowa 39, 91 N. W. 820, and *Christy v. Railroad Co.*, 126 Iowa 428, 102 N. W. 194. Were it not for the error in the tenth paragraph of the charge, to

which reference is hereinafter made, this point could well be overruled. That instruction, as will be seen, recognizes or seems to recognize that a plea of assumption of risk is in the case, and that the burden of establishing it is on the defendant. If this were the situation (and the jury must be presumed to have so understood it), then the rule of the cases cited would apply. As a matter of fact, however, but for the effect of the tenth paragraph there would be no error in the first. The defendant's answer does not, in our judgment, raise the issue of assumption of risk. The very common use of this phrase with reference to two widely different legal propositions is doubtless responsible for the confusion here existing. When a servant enters the employment of a master, he is presumed to have taken into consideration such danger and exposure to injury as is naturally incident to or connected with such service, even when the master has exercised all reasonable care for his servant's safety. The risk thus arising, which involves no element of negligence on part of the master, the servant takes upon himself and his wages are considered to be his full compensation for the danger thus incurred as well as for the actual labor of his hands. This so-called "assumption of risk" inheres in the contract of employment or in the relation of master and servant and need never be pleaded as a defense. A simple denial of the charge of negligence raises the question of this assumption sufficiently for all purposes of the case.

If the servant brings an action against his master, alleging negligence, and succeeds only in proving that the injury he has sustained was the result of some risk naturally incident to his employment, he fails to recover because he has failed to prove negligence. The very expression, "risks naturally incident to or inherent in the employment," exclude *ex vi termini* the idea of negligence; while "negligence," as applied to the master, conveys with equal certainty the idea of a risk not incident to or inherent in the employment, but arising from the failure of the master to exercise the degree of care which the law requires of him for the safety of the servant. Now, generally speaking, the law never holds the servant to take upon himself the risk of injury from such failure of duty on the master's part; but to this proposition there is a well-recognized exception. While the servant, in entering upon and exercising the employment, may rightfully

take it for granted that the master's duty with reference to his safety has been and will continue to be performed, yet if he know that the master is in fact negligent in any respect, or if such negligence is so patent or obvious that as a person of ordinary capacity he ought to know it and to appreciate the danger therefrom, and with such knowledge he continues in the service without any promise on part of the master to remedy or remove the defect, then he is said to have "assumed the risk" of the master's negligence and cannot recover for injury resulting to himself therefrom. For instance, a railway engineer may act upon the theory that the engine upon which he is placed has been constructed and equipped with reasonable care for his safety; and if it is not, and by reason of any defect due to the company's negligence and without fault on his part, he receives an injury he may recover damages, but if while in charge of the engine he discovers in it defective conditions which he knows, or ought to know, expose him to danger and he elects to continue in such employment under such circumstances, he does so at his own peril, and injury therefrom gives him no right of action. It is this assumption of risk, constituting, as we have already said, an exception to the general rule, which affords an affirmative defense to an action by the servant for personal injury and to be available to the master must be affirmatively pleaded and proved. See *Sankey v. Railroad Co., supra.* The plea is to some extent in the nature of a confession and avoidance. It says to the plaintiff, in substance:

"Even if it be true that I was negligent, as you charge, you knew it before the injury of which you complain, and with knowledge of the danger you voluntarily remained in my service and thereby assumed the risk of injury."

But such is not the matter or substance of the answer in this case. The clause or count relied upon by the appellant as presenting the issue is in the following words:

"Defendant further denies that the decedent was unacquainted with the operation of said electric light plant, and alleges the fact to be that he was familiar and acquainted therewith, and had long known the risk incident to the employment in which he was engaged, and assumed all the risks in connection with such employment."

This, it will be readily observed, does no more than plead the assumption of the risk which inheres in the contract of hiring — the risk "incident to the employment" — and raises no question or issue which is not raised by a simple denial of the petition.

For these reasons paragraph 1 of the court's charge to the jury, standing by itself, was not erroneous, and the statement of the material facts required to be shown by the plaintiff to entitle him to recover was sufficiently full and specific.

In the tenth paragraph, however, the court charged the jury in the following words:

"It is alleged by the defendant that the decedent, if killed by an electric current, was killed as a result of the risk assumed by him as an employee of the defendant. In this connection you are instructed that the decedent, William H. Bass, by entering the employ of the defendant and engaging in the work in which he was engaged at the time of his death, assumed the ordinary and usual risks and dangers incident to such employment, which were known to him, or which could have become known to him by the exercise of reasonable care on his part. He is presumed to have had knowledge of those things and conditions which a man of ordinary skill and prudence, under the same or similar circumstances, exercising ordinary care for his own safety, should have known. It was the duty of the decedent to use the natural senses possessed by him to the same extent that a man of ordinary care and prudence would, under the same or similar circumstances, to discover existing dangers; and if the death of the said William H. Bass was due to an electric shock, received by him from a current of electricity, and such current of electricity was one of the ordinary risks and dangers incident to the said employment of the said William H. Bass, which was known to him, or could have become known to him by the exercise of reasonable care on his part, then plaintiff cannot recover, and your verdict will be for the defendant. The burden of proof is upon the defendant to establish the defense, of assumption of risk by the decedent, by a preponderance of the evidence."

Omitting the last clause, this instruction could perhaps be harmonized with the views we have expressed; but when to the admittedly correct statement that the deceased is held to have "assumed the ordinary and usual risks and dangers incident to his employment," and that if his death was from a risk of that character his administrator cannot recover, it is immediately and without explanation added that "the burden of proof is upon defendant to establish the defense of assumption of risk by a preponderance of the evidence," we are confronted by a contradiction or inconsistency which could scarcely have failed to confuse and mislead the jury. It would seem quite probable that by some oversight of the court in formulating the charge, or by some mistake in making up the record for this court, there has been dropped from between the body of this instruction as above quoted and the concluding sentence thereof a clause in which "assumption of risk" as applied to the defendant's alleged negligence was prop-

erly explained, and in connection with which omitted clause the concluding sentence would be a correct proposition of law. We must take it, however, as it appears in the record, and in that form the final proposition clearly places upon the defendant the burden of establishing the assumption by the deceased of the risks ordinarily incident to the employment in which he was engaged, although in the preceding part of the same instruction the jury was properly told that deceased is held to have assumed such risks as a matter of law. The error in the instructions, in the form here presented, is clearly of a prejudicial character.

5. Several exceptions were taken by appellant to the rulings of the trial court on the admission of testimony. Upon the examination of the record we find but one instance where the ruling appears to be erroneous. It was the theory of the defendant that Bass was not killed by an electric shock, but died from heart disease or other natural cause. A witness on the stand was asked by plaintiff's counsel the following question: "You may state, Mr. Spry, from your knowledge of electrical laws, and from the machinery there, and from what you say, what is your opinion as to whether or not Bass received an electric shock before he fell?" Defendant's objection to the competency of the testimony was overruled, and the witness answered, "My opinion is that he did." We think the objection to the question should have been sustained. It is an accepted rule that, while experts may testify as to what in their opinion may or may not have been the cause of a given result or condition, it is not permissible for them to give their opinion as to the ultimate fact which the jury is organized to determine. See *Sachra v. Town of Manilla,* 120 Iowa 567, 95 N. W. 198, and cases there cited. It is the province of the jury alone to draw ultimate conclusions. *Largan v. Railroad,* 40 Cal. 272; *Perry v. Graham,* 18 Ala. 822; *Railroad Co. v. Atteberry,* 43 Ill. App. 80; *Butler v. Railroad Co.,* 87 Iowa, 206, 54 N. W. 208; *Muldowney v. Railroad Co.,* 39 Iowa, 615; *Marcy v. Insurance Co.,* 11 La. Ann. 748; *Wilson v. Reedy,* 33 Minn. 503, 24 N. W. 191; *Briggs v. Railroad Co.* (Minn.), 53 N. W. 1019; *Davis v. Fuller,* 12 Vt. 178, 36 Am. Dec. 334. It is not always easy to draw the line between that which is and that which is not admissible under this rule; but, in our judgment, the question now under consideration required the witness to enter the domain of the jury and pass

upon one of the ultimate propositions inhering in the verdict, and the answer should have been excluded.

6. It is finally argued that the evidence is insufficient to support a verdict in favor of the plaintiff. To this we cannot agree; but, in view of a retrial of the case, it is proper that we refrain from a discussion of the fact features presented by the record. It is sufficient for us to say that the widely extended use of electric agencies is a development of very recent years, and the law has not yet become fully settled as to the duties, liabilities, rights, and remedies of parties in reference thereto. It seems, however, that so far as expressed there is substantial unity in the holding that where one undertakes to produce or deal in a power of such tremendous potency, so concealed from ordinary observation, so laden with death-dealing possibility, and as yet but imperfectly understood and controlled, reasonable care for the protection of those who may rightfully come within the zone of danger requires at his hands a high degree of prudence and watchfulness proportioned to the magnitude and subtlety of the peril to be guarded against. *Barto v. Telephone Co.*, 9 Am. Electl. Cas. 255, 126 Iowa, 244, 101 N. W. 876; *Scott v. Iowa Tel. Co.*, 126 Iowa, 627, 102 N. W. 432; *Herbert v. Lake Charles Co.* (La.), 9 Am. Electl. Cas. —, 35 So. 731, 64 L. R. A. 101, 100 Am. St. Rep. 505; *Mitchell v. Raleigh El. Co.*, 7 Am. Electl. Cas. 644, 129 N. C. 166, 39 S. E. 801, 55 L. R. A. 398, 85 Am. St. Rep. 735; *McLaughlin v. Louisville El. Co.*, 6 Am. Electl. Cas. 255, 37 S. W. 851, 18 Ky. Law Rep. 693, 34 L. R. A. 812; Croswell on Electricity, § 234; *Brown v. Edison Co.*, 7 Am. Electl. Cas. 576, 90 Md. 400, 45 Atl. 182, 46 L. R. A. 745, 78 Am. St. Rep. 442; Keasby on El. Wires, § 245; *City R. R. Co. v. Conery*, 6 Am. Electl. Cas. 217, 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262; *Cook v. Wilmington*, 9 Houst. (Del.), 306, 32 Atl. 643; *Ahern v. Oregon Tel. Co.*, 4 Am. Electl. Cas. 349, 24 Ore. 276, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635; *Wolpers v. L. L. & P. Co.* (Sup.), 9 Am. Electl. Cas. 43, 86 N. Y. Supp. 845. Under all ordinary circumstances the question whether this duty has been performed is for the jury.

For the reasons stated a new trial must be ordered.

Reversed.

CITY OF COLUMBUS v. COLUMBUS PUBLIC SERVICE CO. ET AL.

Ohio, Franklin Common Pleas — March 13, 1906.

17 Ohio Dec. 291.

1. POWER OF MUNICIPALITY TO GRANT USE OF ITS LIGHT POLES. — A municipality has neither express nor implied power, through its board of public service, to grant away to a private company the right to use the city's poles for electric wires, such poles being considered personal property.
2. CREATION OF RIGHTS BY ESTOPPEL — ULTRA VIRES BY EXPRESS GRANT. — A public light company cannot, by estoppel, acquire the right to use light poles of a municipality for electric light wires, when the municipality had no power to expressly grant such right.
3. EXPEDIENCY OF AN ULTRA VIRES ACT NOT TO BE CONSIDERED. — When a contract to grant to a private company the use of the city's light poles is manifestly *ultra vires* on the part of the municipality, the fact that such grant would be desirable, profitable, advantageous, and good policy for the city will not be considered by the court to sustain such a grant.

(Syllabus approved by the Court.)

J. M. Butler, G. S. Marshall, and *D. Keating,* for plaintiff.

Sater & Sater, T. H. Clark, and *J. K. Henry,* for defendants.

Opinion by DILLON, J.:

This action is brought against the Columbus Public Service Company, a corporation organized for the purpose of furnishing electric light and water heating to patrons in the city, and also against the board of public service of the city. The object is to enjoin the use by the said electric light company of certain of the city's poles on which they have strung their wires, and also asks for a mandatory order of the court to compel the removal of such contracts as have already been made. The answers plead the provisions in two of the franches of the defendant light company authorizing such use; also a contract made by said light company with the board of public service, granting such right and privilege; further actions and conduct on the part of the city with the light company amounting in law to an estoppel, and other considerations of policy, economy, and necessity.

The discussion of the court of this case will be as brief as possible, and will especially omit discussion of those fundamental and well-settled propositions of law with which it assumes all counsel in this case to be familiar, as well as to the authorities; therefore all such propositions will be omitted.

The facts establish that about the time the first franchise was granted to the predecessor of the present public service company, to wit, on July 17, 1902, the city itself had, in embryotic stage of development, the establishment of a municipal light plant, which has since been perfected and is constantly growing and in full operation. In that original franchise, and as a part thereof, it was provided "that where said city has erected poles in advance of those to be erected by said company, such poles may be used jointly by the city and said company under reasonable regulations to be adopted by the board of public works of said city." By another ordinance granted to a predecessor of the defendant light company, passed August 3, 1903, it was also provided in substance that where the city had already erected poles, such poles might be used jointly by the city and said company, under a reasonable contract to be entered into by the board of public service of said city and said company.

No contract of any kind was ever made between the city of Columbus and the said light company until August 9, 1905, which will be referred to later. In the meantime the light company from time to time, as their business developed, continued to make contracts with the city's poles in various parts of the city, and on May 17, 1904, the board of public service unanimously adopted a resolution that the said public service company (herein referred to always as light company) be notified to remove their wires from the city's poles and place them so as not to interfere with the city's wires, and to follow out the instructions of Superintendent Wilcox of the municipal light plant. On the same day a letter was mailed to the light company, notifying it of this resolution and asking that there would be no delay in complying therewith. Later, on June 4, 1904, the board passed another resolution, reciting that the said light company be and is hereby required to pay for the use of the city's poles already had, and to remove these wires from the poles at once, "as they were strung thereon without the knowledge and consent of this board, except a few poles on Fifth avenue."

On the same day a copy of this resolution was likewise served upon the light company. On June 6, 1904, the light company answered, expressing some surprise to receive a notice of this character, and reciting the fact that Mr. Pond, one of the members

of the board, had called the writer up over the telephone and requested him to call at the board's office in relation to the use of the city's poles. This letter further recites the franchise under which they were operating, and their expectation to make an agreement by reason of certain verbal conversations previously had with individual members of the board, and reciting further a letter written February 27th, in which the light company had made the proposition that it would furnish the cross-arms and pay the expense of putting them on the city's poles and pay the city fifteen cents per contact each year for all wires strung on the poles. Three days later the light company sent a further communication to the board saying:

"We desire to enter into an arrangement with your board for the joint use of poles. * * * We would be willing to pay fifteen cents per contact, the city paying this company the same — such contract to be drawn in accordance with, and subject to, the provisions contained in ordinance granting this company its franchise."

Two months prior to this last letter, to wit, on April 27, 1904, the city solicitor had rendered a written opinion to the board of public service in which he says that "under no circumstances can you legally lease the city's poles until those poles are erected," and further, "that your board can neither lease the company's poles for the city, nor lease the city's poles to the company, except with the permission and under the direction of council." Said solicitor further stated that he would permit no further contracts. On June 11, 1904, the city solicitor sent a copy of this letter to the public service company, informing it that it was the policy of the city that its poles must not be used by private lighting companies except in strict compliance with the law, and informing the said light company that an action of injunction would be begun unless it would agree to forthwith remove its wires and no longer attempt to use the city's poles.

This communication was answered on June 13, 1904, in which the light company agrees with the statement that the city's poles must not be used by private lighting companies except in strict compliance of law, but claiming that their use is not without a warrant of law, and expressing a willingness to comply with the request not to string wires on any additional poles "until and unless a legal contract shall be entered into by and between this company and the board of public service, and in the event that

such contract cannot be entered into within a reasonable time, this company will then proceed to erect its own poles and at once remove its wires thereto."

On August 29, 1904, the board of public service adopted a resolution "that all wire-using companies having wires attached on city poles without a contract or consent of the city, be notified to remove said wires by September 15, 1904." Said resolution further provided that after such date the superintendent of the municipal plant was authorized to employ the necessary help and remove the wires. A copy of this resolution was, on the same day, sent to the defendant light company. To this communication the defendant light company, on October 14th, sent a letter. After reciting some of the history of the case, it stated that they would as soon as possible erect such poles as may be necessary to meet the requirements, and until that time it agreed to pay the city the sum of fifteen cents per contact. On May 31, 1905, the situation remaining practically unchanged, the board passed a resolution giving the defendant light company seventy-two hours from the date of the passage of the resolution to render a statement as to what contracts they already had, and to state whether or not they would within thirty days remove all their wires, and further stating that in the event that such assurance was not given, or, if the assurance being given and it was not carried out, then at the conclusion of thirty days would, without further notice, remove the said wires from the city's poles. This resolution was also served upon said defendant light company.

In reply to this the light company, by letter, said that by reason of the absence of one of their officers they would not be able to give the information within seventy-two hours, but if the time be extended until Wednesday of next week, they would be pleased to furnish the desired information. On June 7th this information came in the shape of a letter in which, after reciting that they had occupied the city poles under a tentative and favorable agreement with the present board of public service, goes on to state that if the board desired these wires removed, it would require some time for the defendant company to erect new poles, and they asked that the board give it a reasonable time for the reconstruction of its lines, and agreeing that in the meantime they would pay fifteen cents per contact. Attached to this letter

was a copy of the contracts, showing five hundred and ninety-six contacts at various points in the city. On August 9, 1905, the board of public service adopted a resolution reciting their many reasons for so doing, including good business policy and being for the best interests of the city, and whereby all former resolutions were rescinded, and it was resolved that this board enter into a contract with the defendant light company providing for the joint occupancy of the poles at fifteen cents per contact per year.

Some further evidence has been adduced by the secretary of the defendant company, by Mr. Pond, one of the former members of the board, by Mr. Rubrecht, a former member of the city law department, tending to show knowledge or acquiescence of the contacts which were being made, and also testimony by Mr. Butler, former city solicitor, and Mr. Immel, former director of the board of public improvements and now a member of the board of public service, denying any such favorable agreement.

From all the evidence adduced the conclusion is irresistible that so far as the claim is made that the right to maintain these pole contacts has been established and perfected, or acquired by estoppel, no such state of facts exists as will sustain it. The defendant light company was not only from the beginning charged with notice and knowledge of the law, but as a matter of fact, it has not been misled to its disadvantage or prejudice. Whatever acts it may have done were done with full knowledge of the risk which it ran and with full, actual knowledge and in full constructive notice that whatever rights it might acquire upon the city poles must come through strict legal contract. Whatever verbal conversation may have been had from time to time, and they are quite uncertain and indefinite in character, it recognized to the very last the fact that it must either acquire a legal right by contract with the city or remove its wires. I do not think counsel expect any further discussion upon this point, and it has not been forcibly urged in the briefs.

The second consideration set forth in the pleadings and also attempted to be given in the evidence, but rejected by the court, pertained to the good policy of the opposed contract. It was sought to be shown that the presence of two poles on a street where one pole would be sufficient, was a great disadvantage to the public and to the city, both practically and from an artistic standpoint.

Of this fact there can be no question whatever, and this court is not prepared to state that it might not be mutually advantageous both from a financial standpoint to the city as well as to the public generally to have such a contract entered into. It must, however, be conceded by counsel that the exercise of a power by a municipality cannot be increased nor diminished by consideration on the part of the court as to the feasibility, desirability, profit, advantage and good policy thereof. The exercise of discretion lies with those officials of the city charged with that duty, and if the power to exercise that discretion does not exist it cannot be aided by a consideration of the advantages which might accrue therefrom. Therefore, these considerations cannot assist the defendant light company as to the exercise of this right.

The remaining question is as to whether or not the proposed contract which the board of public service is about to enter into, is lawful. This proposed contract, as shown by the resolution quoted above, was entered into after the original petition in this case was filed, and it was rightfully assumed by the defendant company that up to that point no right did exist. The issue upon this contract is, therefore, brought before this court by a supplemental petition. The claim of the city in regard to this contract is, that it is based upon two propositions: First, that the proposed grant or contract is *ultra vires* as to the corporation; second, that even if that be one of its corporate powers, compliance with the mandatory requirements of the statute has not been made. As to the question of power in the municipality, I confess that I have not been able to find among the enumerated powers granted to the municipality, either prior to, or subsequent to, October 22, 1902 (the date of the passage of the present municipal code), any statute giving express authority, nor do I find the power to be necessarily implied from any other express powers which are given. The power granted to the municipality at the time the first franchise in this case was given is found in the Bates Statutes of 1902, digested as Rev. Stat. 3471–3 (Lan. 5600), and cognate sections under Chap. 4, title 2.

The express power, not being given to the municipalities, to grant away its pole rights or any private company desiring to use the poles, the question, therefore, remains as to whether or not it is one of the implied powers of the city. The power having

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of franchises generally for this purpose. It is clear f
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since the city has but one extra arm left upon its poles for
in the future and has not developed its plant yet to its fu
ity. It is more evident that the poles are totally insuffi
the uses which the city already sees ahead of it. It wou
therefore, that since this is not one of those rights which
must exercise as being necessarily or clearly implied in
cise of a power expressly granted, it is, as claimed by co
the city, an act *ultra vires.*

But, passing to the second proposition, that is to say,
this to be one of the powers which the city may exerc

light company, and to this expenditure of money under it, I can see that the reading of the entire franchise relegates these provisions to a very small and unimportant sphere. I believe that it is shown by the evidence, indeed, that the value of all these contracts as proposed to be contracted for would only net $90 a year, and a reading of the franchises in full show that the main purposes so overshadow this one provision, even though it be held illegal, that it could not be claimed that it was one of the material inducements. Indeed, the regulations in the franchise as to poles show that the defendant light company must have contemplated that this provision was purely tentative and might not be entered into at all. Moreover, it is not compulsory upon the city to enter into such a contract, and if the city could not agree as to what was a reasonable regulation, the contract or provision would doubtless fail for uncertainty and lack of remedy, or indefiniteness, since the court would not substitute its discretion for that of the officers of the city as to what would be a satisfactory and reasonable regulation.

To make the proposed contract, authority must be gathered from the code, and seems to be regulated under 96 O. L. 30, §§ 23 to 27 thereof (Rev. Stat. 1536–116 to 1536–120; Lan. 3957 to 3961). It is provided by section 23 that a municipal corporation shall have the power to sell or lease real estate which was not needed for municipal purpose, and the same provision expressly limits the *jus disponendi* of personal property to a sale thereof, no provision whatever being made whereby personal property of the corporation which is not needed for a municipal purpose can be sold, except as therein provided. From the evidence before this court, assuming that this court might pass upon the feature, it is quite evident that the municipality has need of this very personal property, but that being a matter which is probably within the discretion of the city, there is the question before this court as to whether or not this proposed privilege and right is personal property.

The right and privilege to use the city's poles by making a contact therewith by means of wires must come under one or the other head of real or personal property. A pole is not a street or part thereof, or a means of travel and communication, as that expression is used with reference to the use of streets. It is not one of

the original purposes for which streets were laid out and dedicated, as has been held by our own Supreme Court. If it be a mere license to make a contact with the city's poles, as is contended, we would have the strange result, logically following, that the exercise of a mere license could easily result in the complete confiscation and use of the entire property itself. If the pole had room for thirty contacts, and these thirty contacts were given to the defendant light company, the city has totally lost from itself a piece of personal property which was erected at a cost to itself and having value. The true "personal property" is very broad, and if we grant, as it seems to me we must, that these poles are personal property, the use thereof is a granting of such property by the the corporation, and this, it seems to me, follows as conclusively as if it should decide to attempt to lease one of its ladders or one of its horses. The theory of the statute is, that the city shall not enter into any such business; that if it has no use for any such personal property its duty is to sell it. To permit any other theory would permit the city to carry on such leasing business indefinitely.

It is provided by 96 O. L. 30, § 25, that any personal property not needed for municipal purposes may be sold by the board or officer having supervision of the same. No attempt to sell has been made or is threatened in this case, and therefore, discussion as to this section and as to the value of the property involved, and as to whether or not it must be advertised, need not be made. The distinguishment, therefore, between the use of the city's poles and the use of streets must, as I see this case, be the same as the leasing of personal property and the use of streets.

A number of minor points have arisen in the case and I do not think it is necessary to discuss the point that no injury can come to the city through the joint use of the poles. On the contrary I am content to say that circumstances might very often arise when the city and public generally would be greatly benefited, and that may be true in this case. Nor is this a question as to whether or not property owners might complain of the joint use of poles. The board of public service certainly has jurisdiction and power over the use of its own poles, and certainly has power to contract for all such purposes and uses which are necessary for it to carry out the express power granted it in maintaining this municipal

light plant, but in so doing I cannot concede the doctrine to be, that they may at the same time dispose of its own personal property, which involves an entirely different question, even though in thus disposing of its personal property some advantage incidentally accrues to it in the exercise of its express power. Nor is this proposed contract a sale. If it were, the title would absolutely pass from the city. If the city, through its officers, should attempt to sell outright a part of its personal property, a question might be presented here, which, in this case, need not be discussed, but, concluding as I have, that the board of public service has attempted to enter into a contract to lease a portion of its personal property, the statutes (§§ 23, 24 and 25) apply.

An entry may be drawn enjoining the consummation of the proposed contract and also a mandatory order will be granted as prayed for. The time for compliance with the mandatory feature of the order will be such as will be perfectly reasonable in view of the particular business of the defendant light company, and the dependence of its patrons for proper service, and, therefore, if counsel cannot agree upon what is a reasonable time, the court under all the exigencies of the case will fix it. This time will depend, of course, upon the number of contacts which have to be changed and the erection of poles, and so forth, and will be such length of time as will be reasonable under all the circumstances, and not be destructive. The appeal bond in this case will be fixed at $500.

A suggestion was made by one of counsel for further oral argument in this case but I have felt that the briefs covered the case amply and the very urgent insistence and demand for the time of the court in the other cases is such that I have deemed it no injustice to decide the case without further oral argument.

FISHER v. CITY OF NEWBERN.

North Carolina Supreme Court — March 13, 1906.

140 N. Car. 506, 53 S. E. 342.

1. LIABILITY OF CITY OPERATING LIGHTING PLANT. — Where a city is empowered by its charter to erect a system of electric lights for the illumination of its streets, and also to sell power to its citizens for their private resi-

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Liability of City Operating Lighting Plant. — See note to *Davoust v. City of Alameda, post.*

dences and stores, it is liable for the negligence of its employees in operating the plant.

2. DUTY TO GUARD WIRES IN STREETS. — The duty imposed upon persons and corporations maintaining wires charged with electricity, upon the public streets and highways, to exercise a high degree of care for the protection of persons using such highways, is imperative. The wires must either be insulated or placed beyond the danger line of contact with human beings using the public streets in a lawful way.

3. SHOCK FROM WIRE IN STREET. — In an action against a city for death caused by coming in contact with a live wire in the street which had been broken by an engine, verdict for plaintiff sustained.

Appeal by defendant from a judgment for plaintiff. *Affirmed.*

Statement of facts by CONNOR, J.:

Civil action for damages alleged to have been sustained by the plaintiff by reason of the death of his intestate caused by the negligence of the defendant. The testimony, which upon demurrer must be taken as true, showed that the defendant is a municipal corporation. having the usual powers and duties conferred and imposed upon cities and towns in this State. Section 54, c. 82, p. 164, Priv. Laws 1899, entitled "An act to incorporate the city of Newbern," provides "that the board of aldermen are authorized and empowered to construct or buy, maintain and operate an electric light plant for the purpose of furnishing light to the inhabitants of said city, waterworks system and sewerage system, and the said board of aldermen are authorized and empowered to charge reasonable prices for the use of said light, water and sewerage, when furnished to private consumers." Section 55 empowers the city to issue bonds when the proposition to do so has been approved by the qualified voters, for the purpose of buying or erecting a system of light and water, etc. Pursuant to the power vested in the board of aldermen by this act, they purchased a water and sewerage plant and erected an electric light plant. The charter was amended by chapter 41, p. 81, Priv. Laws 1903, and the sections of this statute pertinent to the questions presented by this appeal provide that, for the proper management of the water, sewer, and electric light systems, a commission is established. The members of the commission are named in the act and their terms prescribed. At the expiration of such terms their successors are to be elected in the manner provided for the election of the mayor of the city. The commission is given entire supervision and control of the maintenance, management, etc., of said systems, with power to fix rates for light, water, and sewerage, subject to an appeal to the board of aldermen. Provision is made for paying the expenses of maintaining and operating the systems and payment of interest on the bonds from rates, etc., and the surplus is directed to be held for a sinking fund to discharge the principal of the bonds when due. The commission is required to make quarterly reports to the mayor and board of aldermen of receipts and disbursements, and is given power to employ servants and agents to operate the systems, and to discharge them, etc.

The commission appointed by the act of 1903 were in control of the electric light plant when the plaintiff's intestate received the injury from which he died. The plaintiff's evidence showed that on the night of March 22, 1904,

the electric wire on Queen street was down at Five Points at the police roundhouse. The wire was broken by an engine. The chief of police who saw the wire down telephoned for the electrician employed by the commission, whose duty it was to put up wires and attend to the line. When the electrician came to the place at which the wire was down, he said that the wire was not dangerous; that it could wait until morning. He wound the wire up in a coil and tied it with one end of the wire so that it would not come undone. He hung it upon the electric light pole at the corner of Roundtree street, as high as he could reach, about five and one-half or six feet from the ground. It did not seem to be a live wire. It was the wire to a lamp. The chief of police also telephoned to the mayor about the wire, who directed him to see the railroad agent about it — said he had nothing to do with it. Large numbers of people generally congregate at the place where the wire was down. When the chief of police found the wire in the street the current was on it. The electrician said that it was not a live wire, and there was no danger in it. It supplied a sixteen-candle power light — the same wire which was run in all houses. Two nights after the wire was broken, the deceased, walking along the sidewalk, stepped on it and was killed. It was raining. There was some controversy in respect to the appearance of the body of the deceased after death. The defendant interposed a demurrer to the evidence, which was overruled. Verdict for plaintiff, judgment, and appeal by defendant.

W. D. McIver, for appellant.

W. W. Clark, for appellee.

Opinion by CONNOR, J.:

The defendant's principal contention is presented by its exception to the following instruction:

"Chapter 41, Priv. Laws 1903, does not create the water and light commission into a separate corporation. The act makes the commission officers and agents of the city of Newbern, and, if the jury find that the commission was negligent, the city would be responsible for such negligence."

His honor correctly construed the statute and drew the proper conclusion in regard to the relation established between the commission and the defendant. The Act of 1903, read in connection with sections 54 and 55, c. 82, pp. 164, 165, Priv. Laws 1899, simply establishes a new and separate agency for the management and control of the water, sewerage, and light systems. The vice in the defendant's contention lies in the assumption that the board of aldermen constitute the municipal corporation. It is no more the political entity created by the charter than the Legislature is the political entity called the State. Both are mere governmental agencies established for enabling the people to declare and enforce their sovereign will and purpose. It is entirely immaterial

whether the commission is responsible to or under the control of the board of aldermen. Both are responsible to the municipality, which, for the dual purpose of local self-government and performing such other and appropriate powers as are conferred by the charter, is created by the Legislature under the provisions of Const. art. 8, § 4. If the Legislature had made the commission a corporation, the result would have been the same. It is competent and not unusual for municipal corporations, for convenience in carrying on their varied functions, to use commissions, made bodies corporate; when done, the corporation is a mere agency employed by the municipality with the power of visitation and control in the same manner as if an individual was employed. Such corporations occupy similar relations to the municipality as the university, the hospitals, and the State prison do to the State. They are governmental agencies. Their liability to be sued depends upon the purpose for which they are created. When they are simply agencies of the State, such as counties, they may not be sued for torts committed by the agents, as held in *White v. Commissioners,* 90 N. C. 437, 47 Am. Rep. 534, and many other cases. If, as in cities and towns, they have both governmental and business corporate powers conferred, their liability to suits for the torts of their servants and agents depends upon the sphere of activity in which the wrong complained of is committed. In so far as a municipal corporation is engaged in the discharge of powers and duties imposed upon it by the Legislature as governmental agencies of the State, they are not liable for breach of duty by their officers; in that respect, the officers are the agents of the State, although selected by the municipality. When acting in their ministerial or corporate character in the management of property used for their own benefit or profit, discharging powers and duties voluntarily assumed for their own advantage, they are liable to an action to persons injured by the negligence of their servants, agents, and officers; and it is immaterial whether such servant, agent, or officer be a corporation or an individual. *Moffitt v. Asheville,* 103 N. C. 237, 9 S. E. 695, 14 Am. St. Rep. 810, in which the authorities are cited and reviewed by Mr. Justice AVERY; *Willis v. Newbern,* 118 N. C. 137, 24 S. E. 706.

"The distinction is between the exercise of its legislative powers, which it holds for public purposes and as a part of the government of the country,

and those private franchises which belong to it as a creation of the law. Within the sphere of the former it enjoys the exemption of the government from responsibilities for its own acts and for the acts of those who are independent corporate officers deriving their rights and duties from the sovereign power."

McIlhenney v. Wilmington, 127 N. C. 146, 37 S. E. 187, 50 L. R. A. 470; Ingersoll on Pub. Corp. 415; *Maxmillian v. Mayor,* 62 N. Y. 160, 20 Am. Rep. 468; 1 Smith, Mun. Corp. § 807.

While it must be taken that one of the purposes of the defendant in erecting a system of electric lights was the illumination of its streets, it is equally manifest that in addition to such purpose was that of selling power to its citizens for their private residences and stores. Section 54, c. 82, p. 164, Laws 1899, expressly confers this power, and the amendment of 1903 (page 81, c. 41) in no way limits it. Without expressing any opinion upon the suggestion that the lighting its streets is a governmental function, if that was the sole purpose for which its plant was erected and was being operated, it would seem clear that, as the portion of its charter referring to an electric plant gives it the right to generate and sell power, we must conclude that it was exercising this right. NELSON, C. J., in *Bailey v. Mayor,* 3 Hill, 531, 38 Am. Dec. 669, discussing the question says:

"As the powers in question have been conferred upon one of these public corporations, thus blending in a measure those conferred for private advantage and emolument with those already possessed for public purposes, there is some difficulty, I admit, in separating them in my mind and properly distinguishing the one class from the other, so as to distribute the responsibility attaching to the exercise of each. But the distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the Legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for the purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred."

In that case, the plaintiff sued for the negligent construction of a dam across the Croton river by the agents of the city. The work was done under the control of commissioners appointed by the Legislature. The same argument was made as in this appeal. The court said in response thereto that the city was under no

obligation to accept the charter or amendments, but, having done so, it was bound for the acts of the commission appointed by the Legislature. That case has been uniformly followed by the courts of New York and other States. In *Chicago v. Selz,* 202 Ill. 545, 67 N. E. 386, it is said:

"The injury to the plaintiff did not arise from negligence in the use of its hydrant for the purpose of extinguishing fire. The business of selling water to inhabitants and street sprinkling contractors is not an exercise of the police power, and the city is not exempt from liability for negligence in maintaining such a system."

The conclusion is irresistible that the commission was the agent of the city, and that upon the maxim "*respondeat superior*" it must answer for any injury sustained by its negligence.

In respect to the merits of the case, his honor properly instructed the jury that "negligence is the failure to observe, for the protection of the interest of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. It hardly admits of argument that hanging a live wire on a pole, in the manner testified to by all of the witnesses, in the portion of a city frequented by many persons, and permitting it to remain suspended for two days, in the place and under the circumstances testified to, is evidence of negligence. We see no reason to modify the language of COOKE, J., in *Mitchell v. Electric Co.,* 7 Am. Electl. Cas. 644, 129 N. C. 166, 39 S. E. 801, 55 L. R. A. 398, 85 Am. St. Rep. 735. The duty imposed upon persons and corporations maintaining wires charged with electricity, upon the public streets and highways, to exercise a high degree of care for the protection of persons using such highways, is imperative. The defendant insists that the wire, with which the plaintiff's intestate came in contact causing his death, was charged with a current of only 110 voltage, and could not produce death. The evidence shows that, notwithstanding the theory of the electrician, it did cause death. He was mistaken either as to the voltage or its effect upon a human body. The man either touched it, as contended by the defendant, or stepped on it, as contended by the plaintiff and as found by the jury, and was instantly killed. Persons controlling so dangerous and subtle an agency as electricity must not be permitted to theorize in regard to its probable effects, or speculate upon the chances of results affecting human

life. The wires must be either insulated or placed beyond the danger line of contact with human beings using the public streets in a lawful way. While the testimony regarding the manner in which the contact was brought about is conflicting, the jury have, upon a fair and impartial instruction, accepted the plaintiff's view. The question of contributory negligence was properly submitted. We find no error in the rule laid down in regard to the measure of damages.

The judgment must be affirmed.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. ADAMS.

Kentucky Court of Appeals — March 15, 1906.

28 Ky. L. R. 1265, 91 S. W. 739.

INJURY TO EMPLOYEE OF TELEPHONE COMPANY — TELEPHONE WIRES ACROSS TROLLEY WIRES. — In an action by an employee of a telephone company for injuries sustained from an electric shock, it appeared that the plaintiff was employed by the defendant as a groundman, although before the injury he was beginning to climb telephone poles, and to perform other like duties incident to becoming a lineman. On the evening of plaintiff's injury he ascended a telephone pole by the order of a lineman and while attempting to straighten out the telephone wires, a wire broke and fell across a trolley wire, and this current caused his injuries. It was held that whether plaintiff was a lineman or a groundman does not alter his right to recover if he was at the time of his injury in the performance of a duty which he owed the defendant.

Appeal by defendant from a judgment for plaintiff. *Affirmed.*

Fairleigh, Straus & Fairleigh, for appellant.

Thum & Clark, for appellee.

Opinion by BARKER, J.:

The appellee, Howard A. Adams, a young man some twenty-one or twenty-two years of age, was in the employ of the appellant

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Telephone Wires Across Trolley Wires. — As to injury from contact with broken telephone wire in street, see *Burton Telephone Co. v. Gordon, ante; Met. St. Ry. Co. v. Gilbert, ante; North Amherst Home Telephone Co. v. Jackson, ante; Parsons v. Charleston Consol. Ry., Gas & Electric Co. et al., ante.* As to injury to child from contact with telephone wire blown across trolley wire by storm, see *Warren v. City Electric Ry. Co., ante.*

company as a "groundman," although before the injury which is involved in this action he was beginning to climb telephone poles, and to perform other like duties incident to becoming a "lineman," which is an employment of higher order than a groundman, and for the duties of which higher wages are paid. On the evening he was hurt, as will be hereafter set forth, he claims to have been sent with his brother, Ed. Adams, who was a lineman of the company, by his foreman James Leigh, to Twelfth and Green streets in Louisville, Ky., to adjust some trouble which had occurred to appellant's wires at that point; that when they arrived at the place, his brother Ed. Adams, whose assistant the appellee claims to have been, ordered him to climb the pole and remedy the trouble; that in pursuance of this direction, he climbed up the pole and undertook to straighten out the telephone wires which had become crossed; while so engaged, a wire, one end of which was attached to the pole he was on, and the other fastened to a house across the street, broke at the far end from him and fell across the trolley wire of the Louisville Railway Company, which was highly charged with electricity at the time, and this current being transferred to the broken wire, came in contact with his arm and hand, causing him a severe shock, and burning his arm and finger severely. To recover damages for this accident, he instituted this action in the Jefferson Circuit Court, setting out, substantially, the foregoing facts, and alleging in addition that the wire which broke and caused the injury to him had become worn, rusted, and weakened, and was not sufficient for the purpose which it was serving; that it was not insulated as it should have been in order to protect the appellee from injury; that all of these facts were known to appellant, or could have been known by the exercise of reasonable diligence, and were unknown to appellee. All the material allegations of the petition were controverted by the answer, in which was also pleaded affirmatively the contributory negligence of the appellee. This affirmative matter being denied by reply, the issues were completed. A trial resulted in a judgment in favor of appellee for $600.

The appellant seriously complains of but two errors: First, that the court refused to give an instruction based upon its theory that the appellant, at the time he was injured, was a groundman and not a lineman; and, second, that the verdict is excessive. The

court, among others not complained of, gave the following instructions as the basis of appellant's liability and appellee's right to recover:

"(1) If you shall believe from the evidence that, prior to the time the plaintiff received the injury of which he complains he was directed by his superiors in authority in the employ of the defendant, the telephone company, to go to the place indicated, Twelfth and Green streets, to straighten out the difficulty that had occurred with its wires at that point, and that in pursuance of such direction, or in pursuance of the duties of the position he was then occupying with the telephone company, it became his duty to ascend the pole at the place indicated to remedy the trouble which he was set to overcome, the wire by which he was injured broke, and by reason of the breaking thereof, he received the injuries of which he complains, and you shall further believe from the evidence that the wire in question was by reason of its age, weakness, or by reason of the fact that its having become worn from long service was not reasonably safe, and by reason thereof it broke, and that the defendant, the telephone company, knew, or could have known by the exercise of ordinary care, of the weakness and unsuitableness of said wire, if such was its condition, and that the plaintiff did not know of its weakened condition, if it was weakened, then the law is for the plaintiff, and you should so find unless you shall believe from the evidence that at the time the plaintiff was performing the work which he was doing he himself was negligent, and by reason of his negligence helped to cause or bring about the injury of which he complains, and but that for such negligence upon his part, if any there was, he would not have been injured." "(2) When the plaintiff entered the service of the telephone company he assumed all the ordinary risks incident to his employment, and if you shall believe from the evidence that the injury which he received was one of the risks ordinarily incident to the service, and was not caused by want of ordinary care upon the part of the defendant in attention to its wires at that point, then the law is for the defendant and you should so find. Or, if you shall believe from the evidence that the plaintiff at that time was negligent, that is, that he failed to exercise ordinary care for his own safety, and by reason of that fact he helped to cause or bring about the injury of which he complains, and that he would not have been injured but for his contributory negligence, if any there was, then the law is for the defendant and you shall so find."

The appellant offered the following instruction, as containing its theory of appellee's right to recover:

"(1a) The court instructs the jury that if they believe from the evidence that plaintiff, Howard A. Adams, at the time he was injured was not in the employ of defendant, the Cumberland Telephone & Telegraph Company, as a lineman, and that he was not ordered by one James Leigh, a person superior in authrity in the employ of defendant, to go to the corner of Twelfth and Green streets to adjust or clear some trouble in telephone wires at said point, but the plaintiff, nevertheless, did attempt to adjust or clear such trouble, then the law is for the defendant and you should so find."

We think appellant's insistence, that because at the time he was injured appellee was a groundman and not a lineman is ma-

terial to his right to recover for the injury he sustained, is without foundation either in law or reason. A groundman, as said before, is of lower rank than a lineman, and his duties, ordinarily, are to assist the lineman and to, generally, as his name indicates, stay on the ground; but it is not disputed in the record that appellee, at the time he was injured and shortly before, had commenced to learn the business of a lineman, and for that purpose was allowed from time to time to climb poles in order to learn the business of lineman. He states, and adduces other testimony to corroborate him, that he was sent by the foreman of the gang to which he belonged with his brother to remedy the trouble for which he climbed the pole at the time he was injured. Now it is clear, that, whether appellee is called a lineman or a groundman does not alter his right to recover in this action if he was on the pole at the time of his injury in performance of a duty he owed to appellant. If it be true, as he says, that Leigh sent him to assist his brother, who, being a lineman, was his superior, and the brother told him to climb the pole, then he was in the performance of a duty owing to his employer, the appellant. Of course, if he was a mere volunteer, who went up the pole without right or authority, then the appellant owed him no duty at all. But this very question was submitted to the jury in the instructions given by the court. It is true, Leigh says he did not tell appellant to go with his brother, but only told the brother to go to Twelfth and Green streets and straighten out the trouble with the wires there. We think it entirely immaterial whether or not appellee was technically a lineman or groundman; if he was a groundman beginning to perform the duties of a lineman, and was in truth sent up the pole by his superior, then he was entitled, certainly, to no less protection because of his want of experience than if he had been a lineman so experienced as to know better how to take care of himself.

The whole question turns, not upon whether appellant was a lineman or groundman, but whether, at the time he climbed the pole he was in the performance of a duty he owed the appellant company. This question was fairly submitted by the instructions of the court. The instruction offered by appellant is faulty in that it directs the jury's attention too prominently to the question whether or not appellee was a lineman at the time he was hurt,

and makes his right of recovery to turn, in part at least, upon that question; whereas the court's instructions properly make the appellee's right of recovery to turn upon the question as to whether or not he was in pursuance of the duties of the position he was then occupying with the telephone company (whether lineman or groundman) at the time he was hurt. Our conclusion is that the court's instructions fully cover and define appellee's rights and appellant's liability. There is no question made as to the familiar principle, that it was the duty of appellant to furnish the servant a reasonably safe place in which to work, and reasonably safe appliances with which to perform the duties he was instructed to undertake, and if the master fails in this respect, and the servant is injured by reason of such failure, the master is liable, if he knew, or by the exercise of reasonable care, could have known, of the defects in the appliances, or the danger in the place furnished the servant to work. *Harp v. Cumberland Telephone & Telegraph Co.*, 80 S. W. 510, 25 Ky. Law Rep. 2133; *Conrad Tanning Co. v. Munsey*, 76 S. W. 841, 25 Ky. Law Rep. 936; *Henderson Brewing Co. v. Folden*, 76 S. W. 520, 25 Ky. Law Rep. 969; *Covington Sawmill & Mfg Co. v. Clark*, 76 S. W. 348, 25 Ky. Law Rep. 694; *Angel v. Jellico Coal Mining Co.*, 74 S. W. 714, 25 Ky. Law Rep. 110; *Ohio Valley Railway Co. v. McKinley*, 33 S. W. 186, 17 Ky. Law Rep. 1028; *Tradewater Coal Co. v. Johnson*, 72 S. W. 274, 24 Ky. Law Rep. 1777.

The evidence as to the extent of appellee's injury sustains the verdict of $600 rendered in his favor; indeed, we think if the facts be true, as alleged in the petition, and which appellee's evidence tends to establish, the verdict is a very conservative one.

For the foregoing reasons, the judgment is affirmed.

MORHARD v. RICHMOND LIGHT AND RAILROAD CO.

New York Appellate Division, Second Department — March 16, 1906.

111 App. Div. 353, 98 N. Y. Supp. 124.

1. DEATH FROM CONTACT WITH INCANDESCENT LIGHT — DEFECTIVE TRANSFORMER — EVIDENCE. — In an action against an electric light company for death alleged to have been caused by the defendant's negligence,

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Death or Injury from Contact with Incandescent Light. — See note to *Peters v. Lynchburg, etc., Co., post*, where all the cases in this volume are collected.

it appeared that the deceased was found dead in the cellar of his house; that on his breast and feet were found burns such as might have been caused by an electric current; that an incandescent light with defective insulation was found lighted in the cellar; and there was also evidence showing that for some months prior to the deceased's death sparks had been seen about the transformer and that on the night of the accident the transformer was surrounded by sparks and that a buzzing noise was heard. It was shown that after the accident, the transformer was found to lack one-half inch of insulation on one of the primary wires. It was held that the evidence was sufficient to justify the submission of the defendant's negligence to the jury.

2. SAME — DEGREE OF CARE REQUIRED. — An electric light company, furnishing current for lighting buildings, is bound to exercise a high degree of care to protect persons using such current.

3. SAME — DAMAGES. — Where the deceased was a dentist earning from $17,000 to $20,000 yearly and left a family of young children a verdict of $40,000 was not excessive.

Appeal by the defendant from a judgment of the Supreme Court in favor of the plaintiff and also from an order denying the defendant's motion for a new trial. *Affirmed.*

Before HIRSCHBERG, P. J., and WOODWARD, JENKS, RICH, and MILLER, JJ.

Frank Harvey Field, for appellant.

Herbert C. Smyth (*Millard F. Tompkins,* on the brief), for respondent.

Opinion by RICH, J.:

This appeal is by the defendant from a judgment in plaintiff's favor for $40,000 for damages alleged to have been sustained in consequence of the killing of plaintiff's intestate. His death was caused, it is alleged, by his body coming in contact with a 2,400 voltage current of electricity, which was negligently permitted to flow into the residence of the deceased by the defendant. At the time of the accident defendant was engaged in the business of supplying electricity to various customers at Giffords, in the county of Richmond, of whom the deceased was one. The electric current of 2,400 volts was delivered to a transformer placed upon a pole in front of his residence by two primary wires carrying an alternating current. The office of the transformer was to reduce the 2,400 voltage of the primary circuit to 120 volts, and deliver this voltage of 120 to deceased's residence over a secondary circuit, consisting also of two wires running from the transformer.

The case was tried by plaintiff upon the theory that the transformer was in an imperfect condition, and that because of this condition a deadly voltage of electricity was permitted to pass over the pole of the secondary wire. Plaintiff's intestate was a strong man. He went into his cellar in perfect health, and was dead when found lying upon the cellar floor about an hour later. An electric lamp, suspended by an insulated cord, was lighted. His position was such as to indicate that he had fallen while engaged in lighting this lamp. It was suspended from a nail in the ceiling, to which also was attached a wire hanging down, supporting a swinging shelf. There was a burn between the fifth and sixth rib on the left side of deceased's body, and there was also directly over this a small hole burned in both the outer and under shirt worn by him at the time. Evidence was introduced tending to show that there was a burn on his left foot, and also a burn in the stocking and slipper directly over this burn. The burden of establishing that the accident was the result of defendant's negligence, and that plaintiff's intestate was free from contributory negligence, was upon the plaintiff, and the verdict will not be sustained unless plaintiff has made it appear with reasonable certainty that the injury was inflicted as a result of defendant's negligence. A jury cannot be permitted to arrive at a verdict by speculation or guesswork. *Menzies v. Interstate Paving Co.*, 106 App. Div. 107, 94 N. Y. Supp. 492. It appears that the wire attached to the droplight was defective, and not properly insulated at the point where it came in contact with the wire sustaining the swinging or hanging shelf. This wiring was put in the house and maintained by the deceased, but was only intended to carry a voltage of 120, which was harmless. Defendant contends that it is more reasonable to suppose that deceased met his death as the result of injuries sustained by falling from a small box standing directly in front of the shelf, and that it is at best but a guess as to whether his death was caused by an electric shock or a broken neck occasioned by the fall. If this is correct, of course the verdict cannot be sustained. It has been held repeatedly, and is the law of this State, that where the damages have been inflicted by one of two causes, for one of which the defendant is responsible and for the other of which he is not responsible, the plaintiff cannot succeed where it is just as probable that the

damage was done by one cause as by the other. But is the learned counsel correct as to the conclusion he reaches? It is true that the cause of death has not been established to an absolute certainty; no autopsy was held, and Dr. Hutchinson, a witness called by defendant, testified that: "In order to tell if a man has died from electric shock, in the first place an autopsy is necessary to eliminate absolutely every other cause of sudden death." Yet I think the evidence predominates in favor of plaintiff's theory. It appears that on the night of the accident, and at different times at night antedating the accident, the transformer had been observed to have been surrounded by blue lights and sparkling, and that a buzzing noise was at times observed, resembling rapid hammering; that on the evening of the accident a blue light was observed where the primary wires came in contact with the trees. The transformer was taken from the pole by the defendant after the accident, but was produced upon the trial, and evidence is given that it was tested after the accident and worked properly. It appeared, however, that about one-half of an inch of the insulation was gone off the primary wire in the transformer in one place, and that this bare wire was about $^{9}/_{64}$ of an inch from the iron transformer case. The pole to which this transformer was attached was wet. Evidence was given tending to show that 2,400 volts will jump in the open air from one wire to another two-sevenths of an inch away, and the greater the voltage the greater distance the voltage will jump. Expert evidence was given tending to show that the primary current got on the secondary circuit through the transformer, and in support of this theory our attention is called to the fact that, besides the noise and blue light emanating from the transformer, upon the night of the accident blue lights were observed on the secondary wire leading from the transformer to the house; also that lights in the house were unsteady, at times giving a very bright light (brighter than usual), and then that they would go out entirely, which indicated, the experts testified, that the wires were instantaneously short circuited, and that a ground might be effected through the wooden pole, which was wet. Professor Sever testified that these phenomena indicated "that there was some breakdown in the insulation."

The learned counsel for the appellant admits in his argument

that if "manifestations of electrical energy, as described by witnesses, came from the secondary circuit, there must have been a high voltage current on the secondary circuit." Evidence was given on the part of plaintiff that standing on the cellar floor, in reaching up to turn on the light, the wires at the point where they were attached to the shelf would touch over the region of deceased's heart. His shirt showed a burn, corresponding with the apex of his heart, where the burn on his body was found. Experts gave it as their opinion that deceased received a shock from a high potential current of nearly, if not the entire, electric force of the primary circuit. It appears, however, that from 200 to 220 volts in the secondary circuit, upon both legs of the circuit, would burn out all lights in the house because of the high potential force. The fact that the lamps did not burn out is explained by an expert, who gives it as his opinion that the voltage was connected with but one leg of the secondary circuit. He says: "The deceased came in contact with one leg of the secondary circuit, and in that way got the entire voltage, or very nearly the entire voltage, of the primary." He admits that if the primary circuit had been connected to both legs of the secondary that the fuses would have blown, or all the lamps would have gone out. The fact that the lamps did not go out is a positive manifestation that the current — the high potential — did not go on both legs of the secondary circuit. "This is also shown by the fact that only one of the wires — the insulation of one of the wires — is burned off."

I must confess my inability to understand how there could have been any light in the house if the power was not connected with both legs, unless this great potential force was instantaneous. Mr. Southard stated:

"The fact that the lights in the house did not blow out but remained lit indicated, first, that the circuit fuses in the primary did not blow out. From the fact that they did not blow out when this occurrence took place, why, there was not sufficient amount of current drawn to blow the fuse, and also that the application of the current was not of long enough duration to heat the fuses up sufficiently to blow them. The doctor could have only been in contact a very short space of time, as indicated in the outer shirt — the puncture on the outer shirt, the other shirt, the stocking, and slipper. * * * The burning there would continue after the current was actually through going through the body, due to the fact that woollen will smoulder and will burn."

There was sufficient evidence to warrant the submission of the question of defendant's negligence to the jury. Defendant maintained this primary circuit, charged with an alternating current of 2,400 volts. This was a deadly force, and it was defendant's duty to exercise a high degree of care to protect the deceased from this current. *Caglione v. Mt. Morris Electric Light Co.*, 56 App. Div. 191, 67 N. Y. Supp. 660. It appears that the primary wires were in contact with trees, and that sparks and blue light were observed at the transmitter for some months before the accident, and yet no examination was made of the transformer.

The jury found, after a fair and impartial charge by the learned trial justice, that plaintiff's intestate was killed by reason of a breaking down of the transformer, which permitted the high potential force of electricity to enter the house of the deceased; that this was due to the negligence of the defendant; that deceased was free from any negligence which contributed to his death; and the verdict is supported by the evidence. Deceased was thirty-seven years of age at the time of his death. He was a dentist, and his income from his dental profession was shown to have been from $17,000 to $20,000 a year. He left three children, the eldest being eleven years of age, besides a posthumous child born six months after his death. We do not think the verdict was excessive under the circumstances.

The exceptions have been examined with care, and we find none warranting a reversal.

The judgment and order must therefore be affirmed, with costs.

who manufacture and use electricity must exercise the utmost care to protect others from danger.

2. SAME. — An employee, working in a building equipped with electric lights, has the right to assume, in the absence of notice to the contrary, that the electric light company's transformers and other appliances for furnishing electricity are in good order, and free from defects.

Appeal by the plaintiff from a judgment in favor of the defendant. *Reversed.*

Mat O'Doherty, for appellant.

O'Neal & O'Neal, Forcht & Field, and *R. L. Greene,* for appellee.

Opinion by HOBSON, C. J.:

This action was brought by the appellant as administrator of the estate of Daniel S. Mangan, deceased, to recover of appellee damages for his death which occurred from contact with an electric current in the machine shop of the Louisville & Nashville Railroad Company in the city of Louisville. Upon the trial in the court below the jury returned a verdict for the appellee, and from the judgment refusing appellant a new trial and dismissing the action this appeal is prosecuted.

The cause of action set out in the petition in brief is that the appellee was under contract to furnish the railroad company electricity for the lighting of its machine shops; that it was its duty to see that the lines leading from its plant and dynamos were properly insulated and protected so as to prevent injury to those in the machine shops; that for this purpose it used a transformer connected with its wires outside of the machine shops; that it was appellee's duty to keep the transformer in proper condition and repair, which it negligently failed to do and by reason of such negligence it got out of repair, and became so defective that it suffered an unnecessary, unusual, and highly dangerous current of electricity of not less than 2,000 volts to escape from appellee's lines to and over the lines of the railroad company in the machine shops with which the appellant's intestate, who was an employee of the latter company, and unacquainted with electricity, in attempting to light a certain lamp or burner in the machine shops, came in contact and was thereby killed without fault on his part. The defense interposed by appellee is in sub-

stance that the transformer was in perfect condition, and the intestate's death was caused by his own contributory negligence in getting upon a metal stand to turn on the light in the shops whereby a connection with the ground was furnished the electricity, and by the fault of a telephone line repairer in making a ground connection with appellee's lines on the outside at the same time in repairing a telephone line leading into the adjacent building of the Mengel Box Company, and further that these acts of the intestate and telephone repairer were without appellee's knowledge, and beyond its control. Without consuming time in discussing the evidence it is sufficient to say that though the contention of each party received support therefrom, it was quite conflicting, but unquestionably the case should have gone to the jury as the court allowed it to do.

The instructions given by the court, so far as material, are as follows:

"(1) The court instructs the jury that if they believe from the evidence that the defendant company negligently failed to exercise the utmost care and skill which prudent persons are accustomed to exercise under similar circumstances, in the management and care of its wires, appliances and electrical currents, so as to prevent the entry into the building where plaintiff's intestate was killed of an electrical current that was more dangerous than necessary to reasonably conduct its business of lighting said building, and by reason of such negligence, if any there was, the plaintiff's intestate was killed, then the law is for the plaintiff and the jury should so find, unless they shall further believe from the evidence that the plaintiff's intestate contributed to cause his injury by his own negligence and that he would not have been injured but for his contributory negligence, if any there was. (2) But unless the defendant negligently failed to exercise the utmost care and skill in the management and care of its wires, appliances, and electrical currents so as to prevent the entry into the building, where plaintiff's intestate was killed, of an electrical current that was more dangerous than necessary to reasonably conduct its business of lighting said building, and the plaintiff's intestate was thereby killed, then the law is for the defendant and they should so find. * * * (6) By negligence is meant the failure to exercise that degree of care which a person of ordinary prudence usually exercises under like or similar circumstances. * * * (8) Utmost care, as used in these instructions, means the highest care which careful and prudent persons are accustomed to observe under the same or similar circumstances."

It will be observed that by instructions 1 and 2 before the jury could find for the plaintiff they must find that the defendant had negligently failed to exercise the utmost care which prudent persons are accustomed to exercise, and then in the sixth instruction they were told that negligence is the failure to exercise ordinary

care. So, taking the three instructions together, the jury were in effect told that the defendant was not liable unless it failed to exercise ordinary care to exercise the utmost care and skill which prudent persons are accustomed to exercise under similar circumstances. It will also be observed that, while by the first and second instructions the defendant was required to exercise the utmost care and skill, by the eighth instruction the utmost care was defined as the highest care which careful and prudent persons are accustomed to observe under the same or similar circumstances.

This is not the standard of care which this court has laid down. In *McLaughlin v. Louisville Electric Light Company,* 6 Am. Electl. Cas. 255, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812, the first case on the subject, the court said:

"Electricity is a powerful and subtle force, and its nature and manner of use not well understood by the public, nor is its presence easily determined or ascertained. Its use for private gain is very extensive, and becoming more and more so. The daily avocation of many thousands of necessity bring them near to this subtle force, and it seems clear that the electric companies should be held to the use of the utmost care to avoid injuring those whose business or pleasure requires them to come near such a death-dealing force."

In the next case, *Overall v. Louisville Electric Light Company,* 7 Am. Electl. Cas. 521, 47 S. W. 442, 20 Ky. Law Rep. 759, the court said:

"Appellant at the time he was struck was at a place where his business required him to be, and where he had a right to be and it was the duty of the electric light company to know that linemen of the telephone company would have to come into close proximity to its wires in attending to their duties, and it was its duty to use every protection which was accessible to insulate its wires at that point and at all points where people have a right to go for business or pleasure, and to use the utmost care to keep them so; and for personal injuries resulting from its failure in that regard it is liable in damages."

Approving these cases in *Schweitzer's Administrator v. Citizens' General Electric Company,* 7 Am. Electl. Cas. 571, 52 S. W. 830, 21 Ky. Law Rep. 608, the court again said:

"It was the duty of appellee to use the highest degree of care to keep the lines and appliances in a safe condition, and take care that repairs be made when needed."

The question was again before the court in *Thomas' Administrator v. Maysville Gas Company,* 7 Am. Electl. Cas. 588, 108

Ky. 224, 56 S. W. 153 53 L. R. A. 147, where the court, after quoting from the previous opinions, said:

"From this it will be seen that the court is of the opinion that electric companies should use the utmost care to avoid injuring persons who may be brought in contact with wires charged with electricity."

In *Macon v. Paducah Street Railway Company,* 7 Am. Electl. Cas. 630, 110 Ky. 680, 62 S. W. 496, the court said:

"The definition of ordinary care given in said instruction No. 1 is erroneous in this case for the reason that it has been repeatedly held by this court that persons using electricity either for lighting or for propelling cars, or other business, must exercise the highest degree of care for the protection of all persons in all places where such persons have a right to be."

It is insisted for the appellant that the court should have instructed the jury that the defendant was bound to maintain perfect insulation and was responsible at all events if it failed to do so. Such a rule was in substance announced in *Rylands v. Fletcher,* 3 H. L. 330, but that case has not been followed in the latter cases in England or America, the modern rule being that the manufacture and sale of a useful article being a legal act the manufacturer in supplying it to his customers is bound only to exercise such care and skill as the dangerous character of the thing and the attending circumstances demand. *Triple State Natural Gas & Oil Company v. Wellman,* 114 Ky. 79, 70 S. W. 49. Electricity is a powerful and deadly agency. It cannot be seen, and is as silent as it is deadly. It gives no warning of its presence. So the rule has been adopted that those who manufacture and use it must exercise the utmost care to protect others

"When the circumstances of the injury show that a 'live wire'—one charged with a deadly current of electricity—has been allowed to be at a place where the public have a right to be and are, without reason to suspect the dangerous condition of the wire, a *prima facie* case of negligence will have been established. In such a state of case the risk of assuming that the wires and other appliances are in a safe condition is not that of the public, but of the operator of the plant. The operator has the better means of knowing. It is his duty both to provide such appliances as are reasonably safe, and by proper inspection and oversight to keep himself informed as to whether they are safe. Until the public has knowledge or notice to the contrary, they may assume that the operator has properly discharged his duties in these respects."

The case of *Lexington Railway Company v. Fain's Administrator,* 8 Am. Electl. Cas. 499, 71 S. W. 628, 24 Ky. Law Rep. 1443, was of this character.

But the case at bar involves an injury occurring to a workman in the railroad shops and is governed by the general rule. The court should have omitted from the first instruction the word "negligently;" also the words "which prudent persons are accustomed to exercise under similar circumstances;" and for the words "by reason of such negligence" should have substituted the words "by reason of such failure." The words "so as" should also be omitted before the words "to prevent." In the second instruction the same words should be omitted so far as they occur. The definition of utmost care in the eighth instruction is incorrect, and instructions containing in effect this idea have been several times condemned by this court. *McLaughlin v. Louisville Electric Light Company,* 6 Am. Electl. Cas. 255, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812; *Overall v. Same,* 7 Am. Electl. Cas. 521, 47 S. W. 442, 20 Ky. Law Rep. 759; *O'Donnell v. Same,* 7 Am. Electl. Cas. 587, 55 S. W. 202, 21 Ky. Law Rep. 1362. By utmost care and skill as used in the instructions is meant the highest degree of care and skill known which may be used under the same or similar circumstances. In support of these views see Thompson on Negligence, §§ 797, 4036; *Haynes v. Raleigh Gas Company* (N. C.), 5 Am. Electl. Cas. 264, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; *Alexander v. Nanticoke Light Company* (Pa.), 9 Am. Electl. Cas. 188, 58 Atl. 1068, 67 L. R. A. 475, and cases cited in notes; *City Electric Street Railway Co. v. Connery,* 6 Am. Electl. Cas. 217, 61 Ark. 381, 33 S. W. 426, 31 L. R. A. 570, 54 Am. St. Rep. 262; *Uggla v. West*

End Street Railway, 4 Am. Electl. Cas. 389, 160 Mass. 351, 35 N. E. 1126, 39 Am. St. Rep. 481. The court should also have instructed the jury, as asked by the plaintiff, that Mangan in the performance of his duties as an employee in the shops of the railroad company had a right to assume, in the absence of notice to the contrary, that the transformer and other appliances for furnishing electricity were in good order and free from defects. *Ramsey v. Louisville, etc., R. R. Co.,* 89 Ky. 104, 20 S. W. 162; Shearman & Redfield on Negligence, § 92.

Judgment reversed, and cause remanded for a new trial.

DAVOUST v. CITY OF ALAMEDA.

California Supreme Court — March 30, 1906.

149 Cal. 69, 84 Pac. 760.

1. LIABILITY OF CITY FOR NEGLIGENCE IN MAINTAINING ELECTRIC LIGHT PLANT. — A city in maintaining and operating its electric plant does not exercise its governmental functions and is liable the same as an individual for injuries resulting from its negligence.
2. SAME. — The fact that the grant of authority to maintain an electric plant was given to the board of trustees of a city, and not, in terms, to the city, does not relieve the city from liability for negligence in maintaining the plant.
3. TRESPASSERS — LICENSEES. — Where a woman, walking along a path across a vacant lot, which had been used generally for more than five years, was

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Liability of City for Negligence in Maintaining Electric Light Plant. — Cities using electric wires are bound to the very highest degree of care to avoid injury to every one who may be lawfully in proximity thereto. *Emery v. City of Philadelphia, ante,* 208 Pa. 492, 57 Atl. 977. They must be held to the duty of exercising such diligence and care in maintaining electrical wires as is commensurate with the danger. *Eaton v. City of Weiser, post,* 12 Idaho 544, 86 Pac. 541. It is the duty of a city in stringing wires to exercise proper care in maintaining such wires, *City of Greenville v. Pitts,* 107 S. W. 50. A municipality is not bound to inspect electric wires except in the case of obvious danger or exceptional occurrence, the electric company maintaining the wires being primarily liable for their condition. *Fox v. Village of Manchester, ante,* 183 N. Y. 141, 75 N. E. 1116.

The maintenance and operation of an electric plant by a municipality is not one of its public and governmental powers and duties, but is rather a proprietary and private right and power, for the careless and negligent exercise of which the municipality will be held liable. *Eaton v. City of Weiser, post,* 12 Idaho 544, 86 Pac. 541. The same rule is applied in the reported case. A city is liable or not liable by precisely the same rules as an individual.

killed by contact with a live wire of an electric company, which was negligently allowed to lie across the path, the electric company cannot escape liability on the ground that the deceased was a trespasser, for she was a licensee.

Appeal by plaintiff from a judgment in favor of defendant. *Reversed.*

J. C. Campbell, W. H. Metson, and *Reed & Nusbaumer* (*J. R. Glascock* and *J. M. Poston,* of counsel), for appellant.

M. W. Simpson and *Chapman & Clift,* for respondent.

Opinion by McFARLAND, J.:

This action is to recover damages for the death of plaintiff's wife alleged to have been caused by the negligence of defendant, the city of Alameda, in operating an electric lighting plant owned by defendant, and used for the purpose of lighting said city and furnishing light to its inhabitants for domestic purposes. The trial court granted a nonsuit and gave judgment for defendant, and from this judgment plaintiff appeals. There is a bill of exceptions which presents the evidence and the rulings of the court.

It does not appear upon what ground the nonsuit was granted; but the main point argued by counsel for respondent is that because the defendant is a municipal corporation it is not liable to pay any damages, even though the death of plaintiff's wife was caused by the negligent operation of the electric plant. And in

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Yazoo City v. Birchett, post, 89 Miss. 700, 42 So. 569. But a city cannot be held liable for negligence in maintaining an electric plant unless it had authority to furnish lights to private citizens. *Village of Palestine v. Siler, post,* 225 Ill. 630, 80 N. E. 345.

As to liability of city and contractors, authorized to erect an electric light plant, for the death of a boy from contact with a suspension wire, see *City of Owensboro v. Westinghouse, Church, Kerr & Co.,* 165 Fed. 385. Liability of city for injury to policeman by contact with electric wire maintained over the roof of a building, see *City of Greenville v. Pitts,* 107 S. W. 50. Liability for injury to traveler from contact with electric wire near the public street, see *Emery v. City of Philadelphia, ante,* 208 Pa. 492, 57 Atl. 977. As to liability of city or town for negligence of its employees and servants, see *Fisher v. City of Newbern, ante,* 140 N. Car. 506, 53 S. E. 342; *Posey v. Town of North Birmingham, post,* 154 Ala. 511, 45 So. 663. As to the liability for injuries resulting from contact with a live wire in the street, see *Aiken v. City of Columbus, post,* 167 Ind. 139, 78 N. E. 657; *City of Emporia v. White, post,* 74 Kan. 864, 86 Pac. 295. As to liability for negligence in maintaining wires over railway track, see *Todd v. City of Crete, post,* 79 Neb. 671, 113 N. W. 172.

support of this contention respondent relies on *Winbigler v. City of Los Angeles,* 45 Cal. 36; *Denning v. State,* 123 Cal. 316, 55 Pac. 1000; *Chope v. City of Eureka,* 78 Cal. 588, 21 Pac. 364, 4 L. R. A. 325, 12 Am. St. Rep. 113, and the cases there cited. These cases undoubtedly establish the rule in this State, although it has been held differently in some other jurisdictions, that a municipal corporation, when exercising governmental functions as an agent of the sovereign power, is not liable for damages caused by the negligence of its employees, unless it is expressly so made liable by statute. But this rule applies to a municipal corporation only when acting in its governmental, political, or public capacity as an instrumentality intrusted by the State with the subordinate control of some public affair. Such a corporation, however, has a double character — governmental, and also proprietary and private — and when acting in the latter capacity its liabilities arising out of either contract or tort are the same as those of natural persons or private corporations. And while we have been referred to no case in this State where the proposition last stated was directly involved, yet in all the cases from this State cited by respondent the acts complained of were connected with the exercise of what has uniformly been held to be governmental functions, such as maintenance of public streets and roads, protection from fire, etc. However, the distinction has been frequently recognized and stated in the California decisions. In *Touchard v. Touchard,* 5 Cal. 307, the court say:

"A corporation, both by the civil and common law, is a person, an artificial person; and although a municipal corporation has delegated to it certain powers of government, it is only in reference to those delegated powers that it will be regarded as a government. In reference to all other of its transactions, such as affect its ownership of property in buying, selling, or granting, and in reference to all matters of contract, it must be looked upon and treated as a private person, and its contracts construed in the same manner and with like effect as those of natural persons."

In *San Francisco Gas Co. v. San Francisco,* 9 Cal. 469, Justice Field says:

"The distinction alluded to refers to the double character of a municipal corporation; its public and political character in which it exercises subordinate and legislative powers, and its private character in which it exercises the powers of an individual or private corporation."

In *Ukiah v. Ukiah W. & I. Co.,* 142 Cal. 179, 75 Pac. 775, 64 L. R. A. 231, 100 Am. St. Rep. 107, this court says:

"The distinction between the powers conferred on municipal corporations for public purposes and for the general public good, and those conferred for private corporate purposes, is clearly marked by the decisions" — citing cases.

In *Denning v. State,* 123 Cal. 316, 55 Pac. 1000, it was held that the State was not liable for injury caused plaintiff by negligence of a board of harbor commissioners, because the latter were exercising purely governmental powers; but the distinction above mentioned was clearly stated. The court said, among other things, that the plaintiff, when injured, was employed in a distinct branch of the service, "viz., the protection against or extinguishment of fires, which, even in the case of municipal corporations, is uniformly held to be the exercise of a purely governmental function; and there is certainly as strong ground for distinguishing between the different functions of the board as there can be for distinguishing between the different functions of a municipal corporation, in the exercise of some of which the corporation is liable for negligence, while in others it is not." See, also, *Holland v. San Francisco,* 7 Cal. 361; *Argenti v. San Francisco,* 16 Cal. 255; *Brown v. Board of Education,* 103 Cal. 531, 37 Pac. 503.

In other jurisdictions the rule that municipal corporations are liable like individuals and private corporations when the injury arises out of their exercise of mere proprietary and private rights has been expressly and frequently decided. Indeed, the rule has become text-book law. In Dillon's Municipal Corporations, § 66, the author, having said that a municipal corporation "possesses a double character; one governmental, legislative, or public; the other, in a sense, proprietary or private," proceeds as follows:

"In its governmental or public character, the corporation is made, by the State, one of its instruments, or the local depositary of certain limited and prescribed political powers, to be exercised for the public good on behalf of the State rather than for itself; * * * but in its proprietary or private character, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the State at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual."

There are numerous authorities to the general point of the distinction between the governmental and the proprietary character of municipal corporations, but it will be sufficient here, on the general question, to refer to the opinion of the Supreme Court of Oregon in the case of *Esberg Cigar Co. v. Portland,* 34 Ore. 282, 55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651, where the

authorities are nearly all cited. See, also, *South Carolina v. United States,* 199 U. S. 437, 26 Sup. Ct. 110, 116, 50 L. Ed. —.

And that the respondent, in maintaining and operating its electric plant, was exercising, not its governmental functions, but its proprietary and private rights, is entirely clear. There is obviously no distinction, so far as the law on the subject is concerned, between an electric plant for furnishing light, which is comparatively a new thing, and a gas plant maintained for the same purpose; and it has been directly held that a municipal corporation operating a gas plant is liable for injury caused by its careless management. In Dillon's Municipal Corporations, § 954, it is said: "A municipal corporation owning waterworks or gasworks which supply private consumers on the payment of tolls is liable for the negligence of its agents and servants the same as like private proprietors would be;" and ample authority is cited sustaining the text. In *Western S. F. Society v. Philadelphia,* 31 Pa. 183, 72 Am. Dec. 730, the Supreme Court of Pennsylvania say:

"The supply of gas light is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise. * * * The whole investment is the private property of the city, as much so as the lands and houses belonging to it. * * * It [the city] stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred."

In *San Francisco Gas Co. v. San Francisco, supra,* the court say:

"The purchase of gas involves only the exercise of a power of a private corporation; it requires no exercise of any political power. It is as much an act of a private character as if made by a private corporation."

In *Esberg Cigar Co. v. Portland, supra,* the facts were that the city of Portland owned and maintained a system of waterworks, and the plaintiiff therein brought the action for damages for injuries caused by the negligent management of the said waterworks; and it was contended for defendant "that the waterworks belonged to the city in its public or governmental capacity, and it therefore is not liable in a common-law action for negligence in constructing or maintaining the same." But the court held otherwise, and, after alluding to the distinction aboved stated, said:

"In accordance with this distinction it is quite universally held that when a municipal corporation voluntarily undertakes to construct and maintain water or gas works in pursuance of statutory authority, for the purpose of supplying the inhabitants thereof with water or gas at rates established by the city, it is liable for an injury in consequence of its acts in constructing and maintaining such works, the same as a private corporation or individual."

And, surely, this principle applies as fully to the maintenance of an electric lighting plant as to the maintenance of waterworks. In the case at bar, the city of Alameda was merely given the optional privilege of constructing and maintaining an electric lighting plant; no duty was imposed on it to do so. Our conclusion on the main point above discussed is that the respondent cannot escape liability for the negligence averred in the complaint on the ground that it is a municipal corporation.

There are some points made by respondent upon the theory that defendant would not have been liable even if it had been a private person or corporation, which we will allude to briefly. We would not be justified in holding that the evidence was not sufficient to show that the death of appellant's wife was caused by negligence in operating the electric plant. Whatever the evidence may be on another trial, that which appears in the present record is sufficient to establish the negligence. The contention that appellant cannot recover because his wife at the time of the accident was a trespasser is not maintainable. There was, and for many years has been, a street railroad station on Monroe street, and south of that station, and fronting it, there was a vacant uninclosed level lot owned by a person who is in no way involved in this litigation. Across the vacant lot there was a way, or beaten path, about four feet wide, which had been for many years — more than five years — used by residents in the neighborhood in going from their homes to the said station on Monroe street. While plaintiff's wife was walking along this path and when within a few feet from Monroe street, she came in contact with a live wire of respondent's electric plant, which was negligently allowed to lie across the path, and was killed by the current. Is is not necessary to inquire what would have been the liability of the owner of the lot if he had also owned the electric plant and had been guilty of the negligence which caused her death, although, even then, the allowance of such a deadly trap probably could not have been excused on the ground that the woman was a trespasser, even

if she had been. But no such question arises here. She had a right to be where she was, at least, as against every one except the owner of the lot; and the respondent, itself a mere trespasser, is in no position to raise the question as to what duty the owner of land owes to a trespasser; moreover, she was not a mere trespasser, but a licensee.

Respondent contends that the city was not liable because the grant of authority to maintain the electric plant is given to "the board of trustees of such city," and not, in terms, to the city; but we do not see any force in this contention. A "city" is a mere intangible thing, existing only in legal contemplation; it could not itself use the franchise, and can act only through its governing body, the board of trustees. A grant of a franchise, in terms, to the city, would be, in effect, a grant to the body having the power to use it. In *Arnold v. San Jose,* 81 Cal. 618, 22 Pac. 877, this court said:

"A distinction is made by appellant between cases arising under charters making it the duty of a city, as such, to keep the streets open and in repair, and those which make it the duty of the city council to do so. We are unable to see any merit in the point."

And further on in the opinion it is shown that *Winbigler v. Los Angeles, supra,* does not hold differently.

We do not think that there was a nonjoinder of plaintiffs; and, as to other points, it is sufficient to say that none of them are, in our opinion, tenable or necessary to be specially noticed.

The judgment appealed from is reversed.

We concur: BEATTY, C. J.; ANGELLOTTI, HENSHAW, LORIGAN, SLOSS, JJ.

SHAW, J. I concur.

The rule is well established in this State that, in the absence of a statutory provision permitting it, an action will not lie against a municipal corporation for damages caused by the negligence of its officers, agents, and servants in the performance of the public or governmental duties of such corporations. *Winbigler v. Los Angeles,* 45 Cal. 37; *Howard v. San Francisco,* 51 Cal. 52; *Tranter v. City of Sacramento,* 61 Cal. 271; *Stedman v. San Francisco,* 63 Cal. 193; *Chope v. Eureka,* 78 Cal. 589, 21 Pac. 364, 4 L. R. A. 325, 12 Am. St. Rep. 113; *Arnold v. San Jose,*

81 Cal. 618, 22 Pac. 877; *Doeg v. Cook,* 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171; *Ukiah v. Ukiah, etc., Co.,* 142 Cal. 182, 75 Pac. 773, 64 L. R. A. 231, 100 Am. St. Rep. 107; *Sievers v. San Francisco,* 115 Cal. 654, 47 Pac. 687, 56 Am. St. Rep. 153. The statement of the rule implies that there are other functions and powers of municipal corporations, for the negligent performance of which by its officers and servants such corporations are liable. The distinction is clearly stated in the principal opinion. The authorities uniformly hold that the dutes arising from the operation of gasworks, electric works, waterworks, and such like public utilities, are of the private nature which is required to make municipal corporations lable for damages caused by negligence therein. It is evident, however, that the division of municipal functions into two classes, one public and governmental, the other private and corporate, is without any real foundation, and is made solely from the supposed necessity of doing so in order to allow a suit to be maintained for such injuries. In its public functions a municipality was said to represent the sovereign power, and as such to be exempt from private action. Hence, with respect to the class of powers here involved, it was considered necessary to designate them as private in character, in order to uphold a suit to recover for these injuries. The only reason given for classifying the power to administer public utilities as private and corporate is that private persons and corporatons frequently engage in such enterprises; that they are carried on by the city for its own profit; and, in a few cases, that the municipality has contracted with the sovereign power to do such things, and is, therefore, acting in a private capacity. None of these reasons is of any force. Private persons and corporations also frequently undertake to give police protection and fire protection to the inhabitants of cities. Yet these functions, in all cases where they are performed by a city, are always considered to be public and governmental, thus showing that the fact stated constitutes no reason for the distinction. It may be that in former times cities engaged in such enterprises for the sake of the profit to be made thereby. But, under our system, its charges for service are fixed solely for the purpose of covering the operating expenses and providing a sinking fund, and the profit, if any, is merely incidental. The making of contracts with the State by

municipalities to supply such public needs is with us utterly un known. In our form of government and under our constitutiona provisions, a city can have no active powers or functions that ar not public and governmental in character. *Low v. Marysville* 5 Cal. 214. Its merely passive power to hold and possess prop erty to which it has lawfully acquired title may not differ mate rially in its effects, with respect to the liability for a misuse o such property, from those of a private corporation or person t hold and possess such property, and after such property has fo any reason become no longer necessary for municipal purpose its continued ownership and possession may have no direct rel tion to the public welfare or benefit. But its active powers ar all given for the purpose of enabling it the better to adminis public affairs so as to subserve the public good and promote t general local public welfare, or, as the agency of the state, affai of a more general concern, which are primarily committed to t State; and all such active powers, whether of one class or the othe are essentially of a public and governmental character.

It must be conceded that the rule holding cities liable for su injuries is more conducive to justice than would be the contrar "The rule of law is a general one, that the superior or employ must answer civilly for the negligence or want of skill of his age or servant in the course or line of his employment, by which a other, who is free from contributory fault, is injured. Municip corporations under the conditions herein stated, fall within t operation of this rule of law." 2 Dill. Mun. Corp., § 968. O

engaged in enterprises of this character, as is well known, are liable for the neglect of their agents and servants in the line of their duties, and the expenses caused thereby form a part of the necessary operating expenses of the business, and their rates must be fixed with that item in view. When municipal corporations engage in the same business, although they may do so solely for the general public benefit, and not for the profit to be derived therefrom, it is but fair and just that they should be subjected to the same burden. This burden can easily be shifted to the general public who should bear it, by adjusting the rates charged for the service, so as to cover this additonal cost of operation.

The question how far, and in the exercise of what powers, a city should be held liable for such injuries, is one of policy, exclusively. The Legislature has the power to dictate this policy. It has been settled at common law, upon various grounds (for it has not always been based upon this supposed distinction), that municipal corporations are liable for injuries caused in the exercise of certain powers, and are not liable for injuries arising from certain other powers, unless such liability is created by statute. Among the powers for which it is held liable in this manner are the power to carry on for the public use gasworks, electric works, waterworks, and other like public utilities, and this was a well-settled rule of the common law. *Hill v. Boston,* 122 Mass. 344, 23 Am. Rep. 332; 1 Dill. Mun. Corp., §§ 26, 27, 66, 67; Id. vol. 2, §§ 961, 966. The common law has been carried into our jurisprudence and made the rule of decision in all the courts of this State by section 4468, Political Code. So far as the class of powers here involved is concerned, the rule is manifestly in accordance with justice, and is also in accordance with good public policy. It is not good policy that a person who receives an injury by the negligence of public servants engaged in carrying on such public utilities should be made to suffer the injury without recourse upon the public which receives the benefit of the services, and which, by reason of the proposed exemption of the public from such liability, would be enabled to obtain the service at less cost than if it were performed by private persons. This rule, having been established at common law and being in existence at the time the statute was passed authorizing the creation of cities of the class to which Alameda belongs, must be considered in con-

struing the statutory provision for the creation of such cities. It is provided by the statute (section 750 of the municipal corporation act) that every municipal corporation of the fifth class "may sue and be sued in all courts and places, and in all proceedings whatever." Deering's Gen. Laws 1897, p. 845. I think this provision, in connection with section 4468 of the Political Code, and the established common-law rule, should be construed as a statutory declaration that cities of this class are liable for the negligence of its agents and servants in all cases where such liability was established at common law, and that this can be upheld as a statutory provision without the necessity of resorting for its support to a distinction which is wholly fictitious, and which will produce, as such arbitrary distinctions are apt to produce, embarrassing consequences, if recognized as real and applied to other questions.

MINNESOTA CANAL AND POWER CO. v. KOOCHICHING CO. ET AL.

Minnesota Supreme Court — March 30, 1906.

97 Minn. 429, 107 N. W. 405.

EMINENT DOMAIN — PUBLIC USE — GENERATION OF ELECTRICITY BY WATER POWER. — 1. On appeal from an order dismissing a petition in condemnation proceedings in which the petitioner seeks to take private property (1) to create a water power and to construct, create, and maintain a water power plant to (a) supply water power from the wheels thereof, (b) generate and distribute electricity for heat, light, and power pur-

4. When the purposes stated in the petition are part public and part private, the right to proceed must be denied.

5. A use is not public, unless, under proper regulations, the public has the right to resort to the property for the use for which it was acquired independently of the will or caprice of the corporation in which the title of the property vests upon condemnation.

6. The generation of electricity by water power for distribution and sale to the general public on equal terms, subject to governmental control, is a public enterprise, and property so used is devoted to public use.

7. But the creation of a water power and a water power plant for the purpose of "supplying water power from the wheels thereof" to the public is a private enterprise, in aid of which the power of eminent domain cannot be exercised. The nature of water power is such that, under such conditions, it cannot be used by the public to such an extent as to make the use a public use.

(Syllabus by the Court.)

Appeal by plaintiff from a judgment for defendants, and order denying a motion for a new trial. *Affirmed.*

O. H. Simonds, Durment & Moore, and *Baldwin, Baldwin & Dancer,* for appellant.

C. J. Rockwood and *F. F. Price,* for respondents.

H. J. Grannis, J. N. Searles, and *Washburn, Bailey & Mitchell* filed briefs by consent of court and counsel.

Opinion by ELLIOTT, J.:

This appeal involves the right of the appellant to condemn certain land situated on the Rainy river near Koochiching Falls in Itasca county in aid of the construction of certain canals and the creation of a water power plant at West Duluth. Upon this record we are required to determine whether the trial court was right in refusing to grant the prayer of the petitioner upon the facts as found. The petitioner states that it "does not desire to take, acquire, or possess any of said lands hereinafter described, nor to erect, maintain, and operate any of its works upon the same, but it desires and has determined to divert the waters of Birch lake and its tributaries, * * * and thus prevent the waters thereof so diverted from flowing in said boundary lake and streams and through said province of Ontario in Canada over and along said lands, and to that extent only to take and injuriously affect said lands and any property and estate therein." The petitioner is a corporation organized under chapter 34, Gen. St.

1894, for the purposes set forth with great prolixity and some lack of clearness in its articles of incorporation. Without quoting the statement of the general nature of its business, which is set out in full in the findings of the trial court, it is sufficient to say that it is comprehensive enough to cover the enterprise in aid of which it seeks to acquire the defendants' property. In the petition and findings of the court it is said that the "petitioner has undertaken to create a water power and to construct, create, and maintain a water power plant at West Duluth, Minn., to supply water power from the wheels thereof and also by the use of said power to generate and distribute electricity for heat, light, and power purposes, and to construct and maintain a canal or canals or waterways, from Birch lake to Embarrass river and through the Embarrass river to the St. Louis river and from the St. Louis river at the point stated in the said petition to West Duluth on which to operate canal barges for the transportation of various commodities, and to float, raft, run, drive, and boom logs and timber."

A careful study of the petition convinces us that the primary object of the enterprise is the creation of the water power plant, and that the canal is merely in aid thereof, although, incidentally, it may be used for purposes of navigation. The enterprise, as described in detail, provides for the taking of water in large quantities from navigable streams and public lakes, carrying it by means of canals over the divide which separates different water courses, and thus permanently diverting it from its natural course. The waters of the Birch lake drainage area of 1,103 square miles

Louis river. Another canal is to be cut from a point on the St. Louis river about seventy-five miles below the point where the Embarrass river empties into it, to the St. Louis bay near Duluth. A dam at the head of the upper canal at Birch lake and a gate at the head of the lower canal at the St. Louis river will regulate the flow of the waters in the canals in such manner as to let 600 cubic feet of water per second flow through the upper canal into the St. Louis river and a somewhat smaller amount through the lower canal from the St. Louis river into the St. Louis bay.

Birch lake and the streams which flow into it, the North and South Kawishiwa rivers, White Iron lake, Farm lake, Newton lake, and the waters connecting the same, lie wholly within the State of Minnesota. Each of these lakes is capable of floating small steamboats and tugs and being used for the transportation of logs and other commodities. The streams connecting the lakes are not capable of being used by boats or transporting merchandise, because between each of the lakes there are rapids over which boats cannot pass. In times of high water logs or timbers pass down over these rapids, but in ordinary and low stages of water they cannot pass over the rapids without the aid of the head furnished by dams above the rapids. None of these waters within the State have ever been used for any navigation or commerce except the floating and flowing of logs and timber, which have been towed across the lakes and then sent down over the connecting streams and over the rapids ordinarily by the use of dams. A considerable commerce has been carried on over Birch lake and Birch river, and two dams have been constructed to aid in driving logs, one at the outlet of Birch lake, called a "clerking" or "sluicing" dam, and one at the foot of the river, near Fall lake, called the "roll dam." The latter was constructed for the purpose of preventing the logs from being bruised and jammed in making the descent of the steep rapids at that point. Steamboats have been used for towing logs on Birch lake, White Iron lake, Garden lake, and Fall lake. Steamboats have been also in regular use for the past ten years for general commerce upon certain of the boundary lakes and rivers which form a part of the chain of waters involved herein.

The minimum flow of water from Birch lake to the Kawishiwa rivers at any time in the course of the year is about 210 cubic

feet per second, and the average flow in the course of the year is 980 cubic feet per second. The area of the watershed from which the appellant's enterprise would impound its waters is six per cent. of the area of the watershed tributary to Koochiching falls. The trial court finds that it is impossible to determine, except by the actual operation of the appellant's works, to what extent the diversion or withholding of 600 cubic feet per second of the waters from the Birch lake area would lower the level of the waters throughout the chain of lakes and rivers referred to. Up to the present time, no foreign or interstate commerce of any kind has been carried on over the waters referred to, which lie wholly within the State of Minnesota. The country between Rainy lake and Birch lake is for the most part new and unsettled, but there has been sufficient travel along the waterway by rowboat and canoe to create and keep well-beaten portages along the different rapids. The respondent Backus and his associates own land on both sides of the Rainy river, and contemplate the construction of a dam and mills at Koochiching falls for the manufacture of paper, which enterprise contemplates the use of the water course for the transportation of the wood from the Birch lake country to the Koochiching falls.

As stated above, the appellant proposes to take the respondents' land in the manner stated for the following purposes: (1) To create a water power and to construct, create, and maintain a water plant at West Duluth by which to (a) supply water power from the wheels thereof and (b) generate and distribute electricity for light, heat, and power purposes; (2) to construct and maintain a canal, canals, or waterways on which to operate canal barges and to be otherwise used for purposes of navigation. The trial court found that "said canals and waterways and the said water and water power and the said electricity are to be for the use of all municipalities, corporations, and persons who shall desire to use the same, and to be furnished by the petitioner as demands may devolop to all such municipalities, corporations, and persons." The respondents contend that there is no statutory authority for the appellant's enterprise, and also that the uses to which it proposes to put the property are, at least in part, private uses. The trial court refused to grant the petition, because "the purposes for which the petitioning corporation is organized, and

for which it seeks to condemn the lands and rights sought to be condemned * * * are not all public uses, but private uses are involved in and possible thereunder."

The appellant cannot exercise the power of eminent domain unless it is able to show legislative authority to do what it is seeking to do. The power must be clearly granted, and every presumption is in favor of the individual landowner. As said by Chief Justice START in *Minneapolis & St. L. R. Co. v. Nicolin,* 76 Minn. 302, 79 N. W. 304:

"Authority for the petitioner to take land by condemnation for the purpose in question must be found, if at all, in the statute. If it is doubtful whether the statute confers the authority, the doubt must be resolved against the petitioners, no matter what the necessity of the case may be; for it is attempting to exercise one of the highest prerogatives a sovereign can delegate to a subject."

Milwaukee & St. P. Ry. v. Faribault, 23 Minn. 167; *Fletcher v. Railway Co.,* 67 Minn. 339, 69 N. W. 1085; *Telephone Co. v. Railway Co.* (C. C.), 120 Fed. 362; *Holyoke Water Co. v. Lyman,* 15 Wall. (U. S.), 500, 21 L. Ed. 133. To doubt in such a case is to deny. *New Jersey Co. v. Morris Co.* (N. J. Eq.), 15 Atl. 227, 1 L. R. A. 133. This rule is more than a mere aggregation of words. Enterprises which tend to develop the resources of the State should be encouraged, but it is only with the express authority of the legislature that the promoters can be permitted to apply the property of the people to the advancement of their enterprise. As well said by Mr. Justice BREWER in *McElroy v. Kansas City* (C. C.), 21 Fed. 257:

"In these days of enormous property aggregation, were the power of eminent domain is pressed to such an extent, and where the urgency of so-called public improvements rests as a constant menace upon the sacredness of private property, no duty is more imperative than that of the strict enforcement of those constitutional provisions intended to protect every man in the possession of his own."

The Constitution provides that "private property shall not be taken, destroyed or damaged for public use, without just compensation therefor, first paid or secured." The inevitable inference from this prohibition is that private property shall not under any circumstances be taken for private use without the consent of the owner. Even the sovereign power of the State cannot take private property for public use without first making full and

adequate compensation therefor. As said by Judge SANBORN in *Dodge v. Mission Township*, 107 Fed. 827, 46 C. C. A. 661, 54 L. R. A. 242:

"A legislative act which takes or undertakes to authorize the taking of private property for private object, either by taxation or by the exercise of eminent domain, or by any other means, is not a law, but an arbitrary decree whereby the property of one citizen may be transferred to another. Such an act is beyond the limits of the powers granted by the people to the Legislatures of the States, and is without legal force or effect. The legislative power of taxation and power of eminent domain are alike limited to the exercise thereof for public objects, and they cannot be successfully prosecuted for private purposes."

But every citizen holds his property subject to the condition that the State may, in proper proceedings, just compensation being first paid or secured, take it for public uses. The sovereign may exercise this power directly, as when land is taken for a fort, or a public building, or it may delegate it to individuals or private corporations which are engaged in enterprises of a public nature. When thus delegated the power is always clearly defined and subject to definite restrictions as to the manner in which, and the purposes for which, it may be exercised. The right to take the private property of a citizen against his will is justifiable only on grounds of high public policy and on the theory that, in the last analysis, all property is held subject to the public use when necessary for the general benefit. It can be exercised only within the strict terms of the grant and subject to the constitutional restrictions. A corporation which asserts the right, under a delegation

house Co., 96 N. Y. 41; *Dodge v. Mission Township,* 107 Fed. 827, 46 C. C. A. 661, 54 L. R. A. 242; *Gaylord v. Sanitary District,* 204 Ill. 585, 68 N. E. 522, 63 L. R. A. 582, 98 Am. St. Rep. 235; *Tyler v. Beacher,* 44 Vt. 648, 8 Am. Rep. 398; *Allen v. Inhabitants,* 60 Me. 124, 11 Am. Rep. 185. As said in *Irrigation Co. v. Klein,* 63 Kan. 484, 65 Pac. 684:

"Courts determine what is a public use; legislatures, when the power of eminent domain may be exercised in its promotion. Courts may not interfere to limit or control the expression of the law-making power as to the character, quality, method or extent of the exercise of the power of eminent domain by private corporations or persons engaged in the promotion of a public use, when once it has been determined that such use is a public use."

Fletcher v. Peck, 6 Cranch (U. S.) 128, 3 L. Ed. 162.

The respondent earnestly contends that the trial court has not found that the public interests require the prosecution of the appellant's enterprise. Section 2608, Gen. St. 1894, provides that the courts shall hear the proofs and allegations of the parties, and if it "shall be satisfied that the public interests require the prosecution of such enterprise and that the lands or real estate proposed to be taken are required and necessary for the purposes of such enterprise," it shall make an order appointing commissioners to ascertain the amount to be paid to the owner. Under this section it is the duty of the court to determine, as a question of fact, whether the public interests require the proposed enterprise to be carried out. *In re St. Paul, etc., Ry. Co.,* 37 Minn. 164, 33 N. W. 701; *Fohl v. Common Council,* 80 Minn. 67, 82 N. W. 1097; *Minneapolis & St. Louis Ry. Co. v. Village of Hartland,* 85 Minn. 76, 88 N. W. 423. In the case at bar the court refused to allow the petitioners to proceed, but placed its refusal upon other grounds. It is, however, reasonably clear from the findings that the court intended to find that the public interests required the prosecution of the enterprise, and that the petition would have been granted if it had been satisfied that the property was to be devoted to an exclusively public use.

Turning, now, to the source of the appellant's claim of authority, we find that section 2592, Gen. St. 1894, authorizes incorporation:

"For the construction, maintenance and operation of any work or works or internal improvement requiring the taking of private property, or any easement therein for public use, including railways, telegraph lines, canals or

other slack water navigation upon any water course, bay or lake, dams to improve or create a water supply or power for public use, or any work or works with all requisite subways, pipes and other conduits for supplying the public with water, gas light, electric light, heat or power."

In the revision of 1866 the substance of this section appears in the following language:

"Any number of persons not less than five, may associate themselves and become incorporated for the purpose of building, improving and operating railways, telegraphs, canals or slack water navigation upon any river or lake, and all works of internal improvement which require the taking of private property for public use." Chapter 34, tit. 1, § 1.

Water supply or power is not expressly referred to, and the canals which are authorized appear from the context to be such as are in aid of public communication — water highways. The language which relates to railways was added by chapter 14, p. 50, Gen. Laws 1875, and, as amended, the section appears in Gen. St. 1878, c. 34, tit. 1, § 1. Chapter 18, p. 32, Gen. Laws 1885, added the word "bay" after the word "river," and chapter 161, p. 269, Gen. Laws 1887, after the word "telegraphs," added the words "pneumatic tube lines, subway conduits for the passage operation and repair of electric and other lines and pipes." In 1889 certain provisions relating to logging companies and the use of rivers were added to the statute, which appear as section 2633, Gen. St. 1894, and Gen. Laws 1903, p. 189, c. 74, gave the section the form in which it now appears in Rev. Laws 1905, § 2934.

Chapter 360, p. 579, Gen. Laws 1901, amending section 2604, Gen. St. 1894, as amended by chapter 51, p. 49, Gen. Laws 1899, provides:

"Any corporation organized or reorganized under the provisions of this title and any corporation organized for the purpose of improving, developing or using water power or for the purpose of using, generating, or transmitting electricity for heat, light or power purposes may obtain the right of way over, through, under or across any lands needed for the construction or maintenance of any railroad, telegraph, telephone or pneumatic tube line, lines for the transmission of electricity or electrical power for public use and for subway conduits or the use, passage, operation and repair of electric and other lines or pipes, and all necessary sites and grounds for depots, shops and other buildings, requisite for the proper carrying on of the business to be transacted; and may obtain the right to overflow by reason of any dam, lakes, sluice, or other erections necessary for the convenient prosecution of this enterprise all and any lands damaged thereby; and may obtain the right to the use of any land for a towpath, the erection of necessary buildings for the purposes of said buildings and a right of way in and over the bed of any

river, bay, lake or water course and the banks thereof together with the right to overflow, injure and destroy any existing dams, mills or other property, and to canal in and along the valley of such river, bay, stream or water course and to purchase and erect all necessary buildings for the operation and prosecution of any manufacturing business by water power incidentally created by such improvement, by proceeding as in this title provided."

Taking these sections together, it is apparent that the legislature has not expressly authorized the condemnation of land for the construction of a canal which is primarily designed for the creation of power, but incidentally for purposes of navigation. See note, 61 L. R. A. 853 (2a). Section 2592 authorizes the taking of private property for public use in the construction of canals to be used as public highways, but the subsequent statute restricts the canals which may be thus constructed to certain localities by limiting the right of way which may be condemned to such as is for a canal running parallel to the water course. The grant is of the right "to canal in and along the valley of any river, bay, stream, lake or water course." This peculiar language carries the idea that the legislature intended to keep the waters in their natural courses, and we are unable to find any statute which, fairly construed in the light of the presumption in favor of the landowner, authorizes any corporation or individual to construct a canal for the purpose of diverting and transferring the water from one watershed to another for any such objects as are set forth in the appellant's charter or petition.

The doubt as to whether the legislature intended to grant such power is strengthened when we consider the nature of the waters which the petitioner seeks to divert from their natural courses. It is not seriously contended that Birch river is not a navigable stream as defined by the courts of this and other States in which logging and lumbering is extensively carried on. The streams through which the water of Birch lake finds its natural outlet are navigable in fact, and have in the past and will in the future to an ever increasing extent be used as highways for the carriage of logs and the general products of the soil of the surrounding country. The public have a right of way in every stream which, in its natural state and ordinary volume, is capable of transporting to market the products of the forest or mines or of the soil along its banks. It is not essential that the property to be transported shall be carried in vessels or be guided by the hand of man.

Nor is it necessary that the stream shall be capable of navigation against the current, or that it shall be navigable at all seasons of the year. It is sufficient if, from natural causes, it is navigable at certain seasons. Farnham, Waters, vol. 1, p. 121; *Castner v. Steamboat,* 1 Minn. 73 (Gil. 51); *Shurmeier v. St. Paul, etc., Co.,* 10 Minn. 82 (Gil. 59), 88 Am. Dec. 59; *St. Paul & P. R. Co. v. Schurmeier,* 7 Wall. (U. S.) 272; *Swanson v. Mississippi, etc., Ry. Co.,* 42 Minn. 532, 44 N. W. 986, 7 L. R. A. 673; *St. Paul, etc., Ry. Co. v. First Div., etc., R. Co.,* 26 Minn. 31, 49 N. W. 303; *Willow River Club v. Wade,* 100 Wis. 86, 76 N. W. 275, 42 L. R. A. 305; *Davis v. Winslow,* 51 Me. 254, 81 Am. Dec. 573; *Dwinel v. Barnard,* 28 Me. 554, 38 Am. Dec. 507; *Hutton v. Webb,* 124 N. C. 745, 33 S. E. 169, 59 L. R. A. 33; *Farmers' Co-operative Mfg. Co. v. Ry. Co.,* 117 N. C. 579, 23 S. E. 43, 29 L. R. A. 700, 53 Am. St. Rep. 606; *Burke Co. v. Catawba Lumber Co.,* 116 N. C. 731, 21 S. E. 941, 47 Am. St. Rep. 829; *Gaston v. Mace,* 33 W. Va. 14, 10 S. E. 60, 5 L. R. A. 392, 25 Am. St. Rep. 848; *Felger v. Robinson,* 3 Ore. 455; *Hallock v. Suitor,* 37 Ore. 9, 50 Pac. 384; *Pierrepont v. Loveless,* 72 N. Y. 211. In *The Montello,* 20 Wall. (U. S.) 430, 22 L. Ed. 391, Mr. Justice DAVIS said:

> "The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigation of a river, rather than the extent and manner of that use. If it be capable, in its natural state, of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes, in law, a public river or highway."

In *St. Anthony Falls Water Power Co. v. Water Power Commissioners,* 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497, it is held that the existence of rapids does not destroy the navigable character of a stream. In *Broadnax v. Baker,* 94 N. C. 675, 55 Am. Rep. 633, it is said that "such waters lose not their navigability because intercepted by falls, when above and below them the waters can be thus used for the purposes of commerce for long distances."

What has been said with reference to the navigability of Birch river applies equally to Birch lake and the other lakes from which the appellant proposes to draw the water. For the purpose of ascertaining whether the State has authorized this interference with navigable water, it is necessary to examine the prohibitions

which are found in the organic law of the State as well as the statutes. In the Ordinance of 1787 we find the statement that:

"The navigable waters leading into the Mississippi and the St. Lawrence and the carrying places between the same, shall be common highways and forever free as well to the inhabitants of said territory as to the citizens of the United States and those of any other State that may be admitted into the confederacy, without any tax, impost or duty therefor."

The act authorizing the inhabitants of the territory of Minnesota to form a State government provides:

"That the said State of Minnesota shall have concurrent jurisdiction on the Mississippi and all other waters bordering on said State of Minnesota so far as the same shall form a common boundary to said State and any other State or States now or hereafter to be formed or bounded by the same and said river and waters and the navigable waters leading into the same shall be common highways and forever free as well to the inhabitants of the said State as to all other citizens of the United States without any tax, duty, impost or toll therefor."

Substantially, this provision appears as section 2 of article 2 of the Constitution of the State. The first legislature which met under the Constitution passed a law which now appears as section 2385, Gen. St. 1894, and provides that:

"All rivers within this State of sufficient size for floating or driving logs, timber or lumber and which may be used for that purpose are hereby declared to be public highways so far as to prevent obstructions to the free passage of logs, timber or lumber down said streams or either of them."

It is conceded that Birch lake and Birch river and the other waters referred to are meandered waters, and section 6878, Gen. St. 1894, makes it a public offense to "drain or attempt to drain any lake, pond or body of water in the State which has been meandered" unless under express statutory authority. *Dowlane v. Sibley Co.,* 36 Minn. 430, 31 N. W. 517. To unlawfully interfere with or obstruct the navigation of any lake or navigable river is a public nuisance. Section 6613, Gen. St. 1894. Congress has also expressly prohibited the obstruction of any navigable waters of the United States without its consent (Fed. Stat. Ann. vol. 6, pp. 783, 813, § 10), and the States is powerless to authorize any obstructions which would be a violation of the federal statutes. *Williamette Iron Bridge Co. v. Hatch,* 125 U. S. 1, 8 Sup. Ct. 811, 31 L. Ed. 629; *Escanaba Co. v. Chicago,* 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442. The act of September 10, 1890, provides that "the creation of any obstructions not affirmatively

authorized by Congress to the navigable capacity of any of the waters of the United States is hereby prohibited." That these waters are navigable waters of the United States appears certain under the rule announced in *The Daniel Ball,* 10 Wall. (U. S.) 557, 19 L. Ed. 999 (see notes to this case in volume 7 of Rose's Notes, p. 365 *et seq.*). In *U. S. v. Rio Grande Dam & Irrigation Co.,* 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136, it is held that the diversion of waters from a navigable stream to such an extent as to appreciably impair its navigability is an "obstruction" within the meaning of the statute. It is true that the trial court has found that the carrying out of the appellant's enterprise would not substantially interfere with the capacity of the lakes for navigation or any other public use to which they have at any time been put. This finding deals entirely with conditions as they have existed in the past, and does not determine that the enterprise will not interfere with the more extensive use of the waters which is inevitable in the future as the country develops and commerce increases. The court does find that it would, at times, prevent the floating of logs over the rapids in the rivers connecting the lakes within the State unless the petitioner's dam would be so operated as to furnish water for the driving of the logs down the stream at such times as there should be logs to drive, "and it would not be impossible to so operate said dams." This means that the navigation of the streams would be placed under the control of the appellant, to be regulated as it should see fit, thus giving to it as an incident to the power to create a canal and a water power at Duluth the overlordship and control of navigation on large and important public waters of the State. There is at least one stream in this State over which such control has been delegated to a private corporation, but the intention of he legislature to convey similar powers over other streams should be made to appear by the unambiguous language of a positive statute.

We find no such grant, and, in view of the presumption in favor of the rights of the individual, the State and Federal prohibition against the obstruction of navigable waters, the rule that the rights of the State in such waters are sovereign and not proprietary, that they are held in trust for the public as highways and cannot be alienable (*Union Depot, etc., v. Brunswick,* 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789; *Hanford v. Rail-*

way *Co.*, 43 Minn. 104, 42 N. W. 596, 44 N. W. 1144, 7 L. R. A. 722; *Lamprey v. State*, 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541; *Bradshaw v. Duluth Milling Co.*, 52 Minn. 59, 53 N. W. 1066; *Witty v. Bd. of Co. Com'rs*, 76 Minn. 288, 79 N. W. 112; *Rossmiller v. State*, 114 Wis. 169, 89 N. W. 839, 58 L. R. A. 93, 91 Am. St. Rep. 910), the possible effect upon the rights of riparian proprietors in the Province of Ontario, the fact that the doctrine of the appropriation of waters, adopted in some of the western States, does not prevail in Minnesota and is not recognized by the conventional law of nations (*Pine v. Mayor, etc.*, 112 Fed. 98, 50 C. C. A. 145; *City of New York v. Pine*, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820; *Holyoke Water Power Co. v. Connecticut River Co.* [C. C.], 20 Fed. 71), the treaty relations between the United States and Great Britain with reference to the boundary waters between the United States and Canada (7 Fed. Stat. Ann. p. 583), and that the taking of the waters will interfere with streams and lakes which are already devoted to public uses, which can only be done under express statutory authority (*Minneapolis & St. L. Ry. Co. v. Village of Hartland*, 85 Minn. 76, 88 N. W. 423), we are constrained to hold that the appellant is not authorized to condemn the interests sought to be condemned in the lands of the respondent for the purpose of constructing the canal and creating the water power in the manner described in the petition. The petitioner's enterprise necessitates the doing of what is not only not expressly, or by fair inference, authorized, but is expressly forbidden by the statutes of the State of Minnesota and of the United States, without the consent of its representatives.

The appellant contends that the right to divert the waters of navigable streams and lakes can be determined only in an action to which the public is a party. The right to obstruct navigable waters has been determined in numerous cases between individuals, and it is not possible that the court should, in this proceeding, authorize the petitioner to do what it would restrain it from doing in another action. A proceeding to condemn land under the power of eminent domain cannot be maintained unless the use to which the property is to be devoted is exclusively a public use. The mere fact that the corporation has charter authority to condemn land for both corporate and private uses will not prevent the

corporation from exercising the power for the promotion of the public use only. *Irrigation Co. v. Klein,* 63 Kan. 484, 65 Pac 684. But where a proceeding is instituted in which it is sought to exercise the power to condemn property for both public and private uses indiscriminately — that is, where the purposes stated in the petition are part public and part private, the right to proceed must be denied. *Chicago & N. W. Ry. Co. v. Galt,* 133 Ill 657, 23 N. E. 425, 24 N. E. 674; *Gaylord v. Sanitary District,* 204 Ill. 585, 68 N. E. 522, 63 L. R. A. 582, 98 Am. St. Rep. 235. The principle is recognized in *Coates v. Campbell,* 37 Minn. 498, 35 N. W. 366, and in *Stewart v. G. N. Ry. Co.,* 65 Minn. 516, 68 N. W. 208, 33 L. R. A. 427, where it was held that the statute under which the proceedings were commenced when properly construed forbade the use of the elevator for the private grain business of the petitioner. The principle is illustrated by *Harding v Goodlett,* 3 Yerg. (Tenn.) 41, 24 Am. Dec. 546, where it was sought to condemn land for a gristmill, sawmill and paper mill under a statute that authorized the exercise of the power of eminent domain in aid of the building of gristmills. The statute was held constitutional, but the court said:

"The sawmill and paper mill have no public character; the erection of these mills would be wholly for the private use of the petitioners. * * * Had the application been confined to the sawmill and the paper mill, no one would for a moment hesitate to reject it. Does the introduction of the gristmill, thereby asking the land for these complicated purposes, alter the case? In my opinion the application is entitled to no more favor than if nothing was said about the gristmill. If an application of this sort were granted, a like application for the erection of iron works, or any other establishment requiring water power, might be made, and would be entitled to equal favor, provided the applicant, as a pretext, were to associate a gristmill with his other works. Thus the gristmill, the only thing mentioned in the act of the Assembly as having any claim to be of a public character, would be made the subterfuge for vesting in one citizen the land of another, and of giving to the whole establishment, of which it would be but an inconsiderable appendage, the high appellation of a public mill. This would be mocking the citizen, who would thus be despoiled of his land to enrich another. It would be holding out the idea that his land was taken for public use, and that the public exigencies required it, when, in fact, this was only used as a pretext for obtaining the land for private emolument."

When the taking is for a public use, it is, of course, no objection that incidental and private advantage will result to the petitioner. *Lien v. Bd. of Co. Com'rs,* 80 Minn. 64, 82 N. W. 1094; *Moore v. Sanford,* 151 Mass. 285, 24 N. E. 323, 7 L. R. A. 151; *In re*

Mayor, etc., 135 N. Y. 253, 31 N. E. 1043, 31 Am. St. Rep. 825; *In re Warehouse Co.*, 96 N. Y. 41.

It is probably impossible to reconcile all the authorities, and to make them entirely consistent with any definition of a public use. With the exception of a certain line of cases which have grown out of peculiar conditions and apparent necessity, the authorities consistently recognize the fact that a public use means a use by the public. The question of the general public benefit is necessarily also involved, but the two do not always exist together. In this State the court is required to determine whether the proposed public use of the property will be for the public benefit. There is no doubt but that this conception of benefit and public utility and the general welfare of the State is involved in all the cases of this character. In some cases public benefit, instead of public use, is made the test. It has been thought that any instrumentality which tends to promote the public good, such as manufacturing establishments which furnish labor for mechanics, develop and utilize natural advantages, and to create new markets for the products of the community, are of such great public benefit as to justify the State in taking private property in their aid. But such indirect advantages to the general public do not justify the exercise of the power of eminent domain. The contrary theory has, it is true, entered largely into the decisions which have sustained the constitutionality of the various milldam, drainage, mining, and irrigation statutes which have been enacted in certain States. But these cases are recognized as exceptions. The milldam acts originated in New England, at a time when transportation facilities were poor and the public gristmill to which the people might resort was not only a great public benefit, but also a practical necessity. The early authorities sustained the acts upon the ground of the incidental public benefit resulting to the community from such mills. They were sustained on this ground by the early Massachusetts decisions, and by *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444; *Ash v. Cummings*, 50 N. H. 592; *Amoskeag Mfg. Co. v. Head*, 56 N. H. 522; *Amoskeag Mfg. Co. v. Worcester*, 60 N. H. 522; *Olmstead v. Kemp*, 33 Conn. 532, 89 Am. Dec. 221; *Newcomb v. Smith*, 1 Chand. (Wis.) 71; *Fisher v. Horicon Iron & Mfg. Co.*, 10 Wis. 351; *Scudder v. Trenton Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756; *Hankins v. Lawrence*, 8

Blackf. (Ind.) 266. In the late case of *Rockingham Co. Light & Power Co. v. Hobbs,* 9 Am. Electl. Cas. 102, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581, it is said that the earlier New Hampshire cases "cannot be regarded as deciding that 'public use' in the Bill of Rights is synonymous with public benefit, public advantage, or any use that is for the benefit of the state." On the other hand many well-considered cases have held the milldam and flowage acts unconstitutional. *Varick v. Smith,* 5 Paige (N. Y.) 137, 28 Am. Dec. 417; *In re Eureka Basin, etc., Co.,* 96 N. Y. 42; *In re Tuthill,* 163 N. Y. 133, 57 N. E. 303, 79 Am. St. Rep. 574, 49 L. R. A. 781; *Ryerson v. Brown,* 35 Mich. 333, 24 Am. Rep. 564; *Berrian Springs Water Power Co. v. Berrian* (Mich.), 94 N. W. 37[illegible]; *Tyler v. Beacher,* 44 Vt. 648, 8 Am. Rep. 398; *In re Barre Water Co.,* 62 Vt. 27, 20 Atl. 109, 9 L. R. A. 195; *In re Rhode Island Suburban Ry. Co.,* 22 R. I. 457, 48 Atl. 591, 52 L. R. A. 87[illegible]; *Avery v. Vermont Elec. Co.,* 75 Vt. 235, 54 Atl. 179, 98 Am. St. Rep. 818, 59 L. R. A. 817; *Southwest Missouri Light Co. v. Scheurich,* 174 Mo. 235, 73 S. W. 496. In *Miller v. Troost,* [illegible] Minn. 365 (Gil. 282) this court sustained the milldam act solely upon the authorities, but did not approve the doctrine upon which they rested. "It is true," said the court, "that the incidental benefit to the public from turning to use all the power from running streams may be very great and that such is the nature of the property in and along these streams that the power cannot be made available without such a law as we are now considering, but, to say the least, such a law goes to the extreme limit of legis-

of the Constitution. *Lowell v. Boston,* 111 Mass. 454, 15 Am. Rep. 39; *Turner v. Nye,* 154 Mass. 579, 28 N. E. 1048, 14 L. R. A. 487; *Brown v. Gerald* (Me.), 61 Atl. 785, 70 L. R. A. 472. This doctrine was also approved by the Supreme Court of the United States in *Head v. Amoskeag Mfg. Co.,* 113 U. S. 9, 5 Sup. Ct. 441, 28 L. Ed. 889.

The drainage acts have also been sustained by this court. In *Lien v. Bd. of Co. Com'rs,* 80 Minn. 58, 82 N. W. 1094, it is said that the authority to enact such statutes is derived from the police power, the right of eminent domain, or the taxing power, and that all courts agree in sustaining them when the act is in the interest of the public health, convenience, or welfare. A careful reading of that opinion and of that in *State v. Board of Commissioners Polk Co.,* 87 Minn. 325, 92 N. W. 216, 60 L. R. A. 161, will disclose that the cases rest but slightly upon the doctrine of eminent domain and more upon the general power of the legislature to provide for the general welfare, convenience, and health of the community. It is the doctrine applied in the latter Massachusetts cases. It is expressly said that the doctrine is that which is applied to sustain the statutes which provide for the irrigation of arid lands.

The irrigation statutes and those regulating mining rest upon doctrines which form a distinct exception to general principles and arise out of peculiar conditions, which render the general principle inapplicable. *Dodge v. Mission Township,* 107 Fed. 827, 46 C. C. A. 661, 54 L. R. A. 242. The controlling principle is the right of the State to regulate the common interests of the owners of the common property. *Head v. Amoskeag Mfg. Co.,* 113 U. S. 9, 5 Sup. Ct. 441, 28 L. Ed. 889; *Wurts v. Hoagland,* 114 U. S. 606, 5 Sup. Ct. 1086, 29 L. Ed. 229. In *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112, 163, 17 Sup. Ct. 56, 65, 41 L. Ed. 369, Mr. Justice PECKHAM said:

> "If it be essential or material for the prosperity of the community, and if the improvement be one in which all the landowners have to a certain extent a common interest, and the improvement cannot be accomplished without the concurrence of all or nearly all of such owners by reason of the peculiar natural condition of the tract sought to be reclaimed, then such reclamation may be made and the land rendered useful to all and at their joint expense. In such case the absolute right of each individual owner of land must yield to a certain extent to be modified by corresponding rights on the part of other owners for what is declared, upon the whole, to be for the public benefit."

Clark v. Nash, 25 Sup. Ct. 676, 49 L. Ed. 1085, illustrates the exceptional character of this line of cases. "We do not desire to be understood by this decision," said Mr. Justice PECKHAM, "as approving of the broad proposition that private property may be taken in all cases where the taking may promote a public interest and tend to develop the natural resources of the State." Under normal conditions, the distinction must be made between a use which is public and the interest which is public. Where there is simply a public interest, as distinguished from a public use, the power of eminent domain cannot be exercised. The mere fact that the interest is of a public nature, and that the use tends incidentally to benefit the public in some collateral way, confers no right to take private property *in invitum.* A use is not public unless the public, under proper police regulation, has the right to resort to the property for the use for which it is acquired independently of the mere will or caprice of the person or corporation in which the title of the property would vest upon condemnation. *Coates v. Campbell,* 37 Minn. 498, 35 N. W. 366; *Portage Township Board v. Van Hoesen,* 87 Mich. 533, 49 N. W. 898, 14 L. R. A. 114; *Varner v. Martin,* 21 W. Va. 548; *Fallsburg Power and Manufacturing Co. v. Alexander* (Va.), 43 S. E. 194, 61 L. R. A. 129, 99 Am. St. Rep. 855; Lewis, Emin. Domain, § 165. The appellant proposes to create a water power plant and to supply water power from the wheels thereof and to generate heat and electricity for heat, lighting, and power purposes. Here are two distinct purposes and uses to which it proposes to put the respondents' property, and, as we have already found, it is necessary that both should be public uses. Granting that the power of eminent domain may be used to aid in creating power, to be sold to all who desire it under reasonable conditions, and at prices subject to the control and regulation of the State, it is apparent that the nature of the use must be determined by the character of the power and the physical conditions under which it is to be produced and sold. Electric lighting is universally recognized as a public enterprise, in aid of which the right of eminent domain may be invoked. Lewis, Emin. Dom., § 131a. Corporations organized for the purpose of furnishing electric light to the public are *quasi*-public corporations, and, under government control, must serve the public on terms and conditions common to all without

discrimination. *Owensboro Electric Co. v. Hildebrand* (Ky.), 42 S. W. 351; *Cincinnati, etc., Ry. Co. v. Bowling Green,* 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422; *State v. Allen* (Mo. Sup.), 77 S. W. 868; *Griffin v. Goldsboro W. Co.,* 122 N. C. 206, 30. S. E. 319, 41 L. R. A. 240. The same rule has been applied to corporations organized to supply the inhabitants of cities with natural gas for heating and lighting purposes. *Bloomfield Natural Gas Light Co. v. Richardson,* 63 Barb. (N. Y.) 437; *State v. Toledo,* 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729. The right of natural gas companies to exercise the right of eminent domain is recognized in *Consumers' Gas Trust Co. v. Harless,* 131 Ind. 446, 29 N. E. 1062, 15 L. R. A. 505, and in *Carothers v. Phila. Co.,* 118 Pa. 468, 12 Atl. 314. The control of the State over the manner in which such companies shall deal with the public is implied. *State v. City of St. Louis,* 145 Mo. 565, 46 S. W. 981, 42 L. R. A. 113, *reversing State v. Murphy,* 134 Mo. 548, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369, 56 Am. St. Rep. 515. See, also, *Irrigation Co. v. Klein,* 63 Kan. 492, 65 Pac. 684, and cases there cited, and section 2592, Gen. St. 1894.

Most of the cases which involve the use of electricity refer primarily to lighting; power being secondary and incidental, but wherever the question has been raised it has, with the possible exception of *Brown v. Gerald* (Me.), 61 Atl. 785, 70 L. R. A. 472, been held to a public use. See *Hollister v. State,* (Idaho), 71 Pac. 541; *Salt Lake, etc., v. Salt Lake,* 24 Utah 249, 67 Pac. 672, 61 L. R. A. 648; *Id.,* 25 Utah 441, 71 Pac. 1067; *Denver Power & Irrigation Co. v. Denver & R. G. R. Co.,* 30 Colo. 204, 69 Pac. 568, 60 L. R. A. 383. In the recent case of *Rockingham County Light & Power Co. v. Hobbs,* 9 Am. Electl. Cas. 102, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581, it appears that the corporation was organized for the purpose of "manufacturing, creating, furnishing, and selling for light, manufacturing, heating, transportation, propulsion of cars, machines and engines, and for all mechanical, commercial, and business purposes, electricity and gas and all other illuminants and motive powers." It was held that the corporation had no right to devote its property to private uses and the court said:

"The knowledge recently acquired concerning electricity has made it possible to divide power into any desired portions and to freely transport the

same to almost any point for use. This has created a demand for power which, though not so universal as the demand for water, is nevertheless of a public character. Like water, electricity exists in nature in some form or state, and becomes useful as an agent of man's industry only when collected and controlled. It requires a large capital to collect and store it for general use. The cost depends largely upon the location of the power plant. A water power or a location upon tidewater reduces the cost materially. It may happen that the business cannot be inaugurated without the aid of the power of eminent domain for the acquisition of necessary land or rights in land. All these considerations tend to show that the use of land for collecting, storing, and distributing electricity for the purpose of supplying power and heat to all who may desire it is a public use similar in character to the use of land for the collecting, storing, and distributing of water for needs — a use that is so manifestly public 'that it has been seldom questioned and never denied.'" Citing Lewis, Emin. Dom., § 173.

The nature of electrical power is such that it can be indefinitely subdivided and readily transmitted to great distances for use by any number of people for purposes now recognized and innumerable others which the future will certainly disclose. Its development for public uses is in its infancy, but such is the rapid growth of scientific knowledge and mechanical skill that there is every reason to believe that within a few years it will practically supplant all other forms of power.

The generation of electrical power for distribution and sale to the general public on equal terms is a public enterprise, and property so used is devoted to a public use. But the creation of a water power plant for the purpose of "supplying water power from the wheels thereof" is an entirely different proposition. Water power is not, like electrical power, capable of being subdivided into innumerable units and transmitted long distances. The petition states that the company intends to sell the water power from the wheels to all who desire to purchase it, and the appellant admits that it will be subject to government regulation. But words cannot always conceal facts. This statement of the company's purpose cannot control the fact that it is a physical and mechanical impossibility for water power to be sold from the wheels to more than a few persons. A public use does not require that the property be capable of being used by the entire public or by any particular portion thereof, but a use which, by physical conditions, is restricted to a very few persons who must use it within a very restricted area, is not a public use. Water power from the wheels must be used at the wheels, and the actual result, necessarily, is

that a very few individuals will use the power for manufacturing purposes to the exclusion of all others. The effect is the creation of a power plant to create water power to sell to a few manufacturers for use in their private business. Under such conditions the willingness of the power company to sell power from the wheels to the general public has only a theoretical value.

The judgment and order of the trial court are affirmed.

HARRISON v. KANSAS CITY ELECTRIC LIGHT CO.

Missouri Supreme Court — March 30, 1906.

195 Mo. 606, 93 S. W. 951.

1. DEATH FROM ELECTRIC LIGHT WIRE — GROUNDING OF CURRENT — CONCURRENT NEGLIGENCE. — An electric light company having knowledge that a wire was grounded, failed to locate and remedy the defect. Decedent's son, noticing that the wire had become uninsulated by contact with a tree, grounded the same by a copper wire attached thereto, which he wound around the tree and then extended it to the ground. This copper wire came in contact with a cable used to support a swing. Decedent, not knowing the danger, was killed by taking hold of the cable. *Held*, that the electric light company was liable, its negligence being concurrent with that of decedent's son.
2. SAME — INSTRUCTIONS. — In an action for death caused by the grounding of an electric light current, an instruction submitting to the jury the question of proximate cause and assuming that two grounds existed, is proper where both sides admit that unless two grounds had existed no injury would have resulted.
3. SAME — EVIDENCE. — Evidence of a consulting electrical and mechanical engineer, to the effect that there are well-known methods of preventing grounding, which provide the line of wires with loops, so that when a grounding is discovered that portion of the system may be disconnected, was not prejudicial to the defendant.

Appeal by defendant from a judgment for plaintiff. *Affirmed.*

Harkless, Crysler & Histed, for appellant.

Morgan & Schibsy and *Boyle, Guthrie & Smith,* for respondent.

Opinion by MARSHALL, J.:

This is an action under the statute for $5,000 damages for the death of plaintiff's husband, on the 24th of April, 1902, caused by an electric shock from the defendant's wire in Kansas City,

Mo. The action is by the widow. A prior action had been brought by the widow within six months after the death, in which the plaintiff suffered a nonsuit, and this action was brought within one year thereafter, as allowed by the statute. There was a judgment for the plaintiff for $5,000, and the defendant appealed.

The issues:

The petition alleges the relation of the plaintiff to the deceased, and his death on the day stated, the fact of such prior suit, nonsuit, and the institution of this action within the statutory time, the incorporation of the defendant; that it owned a certain electric power house and electric light circuits connected therewith in Kansas City, used by it for the purpose of lighting the streets of said city; that it was the duty of the defendant to maintain and operate the same, as far as ordinary and reasonable care would avail therefor so that the same should be in a reasonably safe condition and not liable to endanger lives and property of others. The negligence charged in the petition is as follows:

"That on and for some time prior to about the 24th day of April, 1902, a certain of said arc light circuits owned and operated by the defendant company, and known, as plaintiff is informed, as circuit No. 32, was in a dangerous and defective condition in that it was 'grounded;' that is to say, that on account of defects in the insulation of said circuit, the wire or wires on said circuit had come into electrical contact with the earth at some place or places to plaintiff unknown, so that upon said circuit becoming grounded at any other place or places, a heavy and dangerous volume and charge of electricity was liable to pass from said circuit to and through any person or persons who might be situated that said charge of electricity should pass through the body of such person or persons and through the earth in what

aforesaid, at some place or places to the plaintiff unknown, and other than at the place immediately hereinafter described, upon the premises of the plaintiff and her deceased husband, Harold, the infant son of the deceased, who knew nothing of the danger of electricity, having discovered that one of the trees upon the premises of the plaintiff and her deceased husband had been burned by the contact of such tree with the wires of said circuit, which was defectively and insufficiently insulated through the carelessness and negligence of the defendant in locating same, so that same was liable to abrasion and destruction, in order to save said tree from further injury, at about the hour of 4:30 o'clock in the afternoon, connected to the wire of said circuit of the defendant, at a place where same was endangering and injuring said tree through such defective insulation, a small copper wire, and continued said copper wire into contact with the ground. That upon the said tree aforesaid there was suspended a swing for the pleasure of the plaintiff's children, constructed of a hanging loop of wire cable suspended from two points of support on a limb of said trees, and supporting a wooden seat in which said children, and others, were accustomed to swing. That said wire cable, so made into said swing, was longer than was necessary for such purpose, and the loose end thereof was wound around the limb of said tree, and down to and around the trunk of said tree, before reaching the ground. That said Harold, after so connecting said copper wire, as aforesaid, conducted the same from said tree down and around the trunk of said tree, so as to bring same in contact with the wire of said cable and bring said cable into electrical contact with the wire of said circuit. That said copper wire being so conducted to and into the ground, the charge of electricity discharged from said circuit passed harmlessly along and through said wire, down and into the ground and through the ground to some other place or places to the plaintiff unknown, to where the circuit was 'grounded,' back into said circuit and through the same returned to the power house of the defendant. That about the hour of 7:25 o'clock in the evening of said day, said Harold noticed that said copper wire or the wire of said circuit of the defendant was again burning said tree where same came into contact therewith, and, in an endeavor to prevent the further injury to said tree, cut off said copper wire between the ground and said tree, so as to leave said copper wire and the said wire of said cable of which said swing was constructed in electrical contact with the wire of said circuit, but without electrical connection with the ground other than through the insufficient and poor conductor which the trunk of said tree and the roots thereof made. That almost immediately thereafter the plaintiff's deceased husband came out into said yard for the proper purpose of speaking to or associating with the children playing about the same, and in entire ignorance of the electrical connection of the cable to said swing, as aforesaid, with said circuit of the defendant, placed his hand in contact with said cable, whereupon said Harrison became part of an electrical connection between said cable and the earth, and the circuit of the defendant, at such other place or places where same had been negligently allowed to become and remain 'grounded,' so that a powerful charge of electricity passed from the wire of said circuit adjacent to said tree, through said copper wire, the said cable and the body of said Harrison, down and into the ground and through the same, through said 'grounded' current connection elsewhere, and back into the circuit of the defendant, caus-

ing the instant death of said Harrison. That the electricity of the charact generated by the defendant in said power house and discharged along an over and through the said wires of said circuits will follow what is known i electrical science as the easiest or readiest conductor in preference to a no conductor, or some other conductor over which it is compelled to pass, wit greater resistance. That the wires used by said boy Harold are among th best known conductors of electricity, and that iron wire, such as said cabl is a first-class conductor of electricity, and while said cable and wire we directly connected with the ground, the electricity passed directly and harm lessly through same and into the ground, but when such copper wire was co there was no connection except through the trunk of said tree until the pe son of said Harrison touched the wire of said cable, when said electricity i mediately diverted itself of sufficient volume to kill said Harrison, a passed through the body of said Harrison, through the ground and on aforesaid. That the volume and character of electricity generated by defen ant at said power house and discharged over and through said circuits many times greater than the amount necessary to produce a fatal injury wh discharged through the human body, all of which, as well as the tendency said electricity to pass through the human body, if parts of the human bo should come in contact with metal connected by contact with said curren when such human body would afford the readiest conductor of said electrici to and through other conductors in a circuit through which such electrici could pass, was or should have been well known to defendant. That long pri to the hour of 7:25 o'clock in the evening of said day the defendant, throu its officers, agents, and employees at said power house, had notice th said circuit had been so 'grounded' that charges of electricity passing o the same were liable to be diverted and might be so diverted as to prod fatal or serious injuries to persons inadvertently coming into the course and becoming part of the conductor in the transmission of said electrici That if defendant had had, as it should have had, such means and applian as are well known to the science of electricity and to persons familiar w the operation of such power house and circuits in use at such power hou it could have promptly ascertained that said circuit had been 'grounded' a located the place or places where its said circuit was so 'grounded,' and rem died said defect and removed said dangerous condition, but through lack such appliances, and the carelessness of the defendant, its servants, age and employees, in failing to locate the places where said dangerous condit

Mo., and Kansas City, Kan. It had a circuit called No. 32, which was twenty miles long. Its plant in Kansas City, Mo., was located at what was called "Turkey Creek Station." That station is three miles from the plaintiff's residence, which was located on Tenth street, near Woodland. Circuit No. 32 is designated as a "lamp loop" to distinguish it from the main or trunk line. Turkey Creek Station runs day and night, but during the day-time the electricity for lighting arc lights on the streets is not turned on, and the plant runs for the purpose of furnishing electric lights to residences and places of business. Circuit No. 32 runs in front of the plaintiff's residence, and had been erected about a year prior to the accident. The wire was strung upon poles which stood between the curbing of the street and the sidewalk. The poles were about twenty-five feet high. An arm ran across the top; one wire hung on one side of the pole, and one on the other. The Harrison residence stood about twenty-three feet back from the street. There was a large tree standing in the yard in front of the house, and about two feet inside of the yard fence. The branches of the tree extended out over the sidewalk, so that the ends thereof, about the size of a lead pencil, came in contact with the arc wire of said circuit. The wires were located about twelve feet from the body of the tree. The branches of the tree that came in contact with the wire by reason of their movement by the wind had rubbed the insulation off of the wire for from two to six inches. For a month or two prior to the accident persons living in the neighborhood had observed that at the point of contact between the branches of the tree and the electric wire in front of the Harrison residence, as also at other points where similar conditions existed, sparks or flashes of light would be thrown off from the wire when the limbs of the trees were moved by the wind, and the trees, themselves, had been injured by their branches coming in contact with the wires. The deceased had a son named Harold, who was fourteen years of age, a boy of considerable intelligence and aptness and with an inclination to experiment with electricity. Prior to the accident he had rigged up an alarm bell, worked by electricity, in the barn, back of the house, and his parents knew of that fact, and knew of his electrical proclivities. About a month prior to the accident the boy conceived the idea of tapping the defendant's wire

at the point where the branches of the tree came in contact with it. On the day of the accident he returned from school about 4:15 or 4:30 o'clock P. M. He took a copper wire, which was thirty-five feet long, that he had been using for the alarm bell, and made a hook about one foot long out of a piece of galvanized iron. He fastened the hook to the end of a stick; then he climbed the tree, went out on the limb, attached the hook to the defendant's electric wire at the point where the insulation was worn off, nailed the stick, to which the hook was attached, to the limb of the tree, attached the copper wire, which had no insulation on it, to the hook and wrapped the wire around the tree, ran it down into the ground, and thence along the edge of the sidewalk to a point near the front of the house. There was a swing attached to one of the limbs of the tree, the ropes of which were made of steel cable about three-fourths of an inch in diameter. This steel cable rope was longer than was necessary for the swing, and the loose end of it had been wrapped around the tree. The boy says that his purpose in so doing was to protect the tree from being injured by the electricity which escaped from the wire to the branch of the tree that rested against it. He says he knew the danger of undertaking to make a connection with the arc wire while the current was on, and also knew that the current was not on the wire during the daytime, nor was it on at the time he made the connection. He says he completed his scheme about 5 o'clock P. M.

During the day of the accident the defendant knew that there

will ring and indicate on which side of the box the ground exists, but will not indicate the point on the wire where the trouble is. In order to locate the exact point of trouble it is necessary for the lineman to make such experiments along the line until the point of trouble is located. The lineman left the down-town office sometime between 2 o'clock and 4:55 o'clock. He first said it was between 2 and 3:30 o'clock, but afterwards said it was not until after the report was received that there was trouble on the circuit. He says it would take four or five, and not to exceed ten minutes, to make each test; he further says that he made about six tests, covering about two miles and consuming about forty minutes. He further says that he made the first test at Twelfth and Brooklyn streets, the second at Eleventh and Prospect, the next at Ninth and Prospect. These are all of the points at which he can definitely state that he made any tests. A record was kept and introduced in evidence showing at what time the report of trouble was received, and at what time the trouble was located and corrected. That report showed that the trouble was first reported at 4:55 P. M., and that the lineman reported circuit "No. 32 O. K. at 5:15 P. M." The lineman says that he never located the trouble, but that after making the tests aforesaid he concluded that the trouble was not on circuit No. 32, but was on the trunk line, and that in making his report at 5:15 that No. 32 was O. K., he meant that he had cleared the line so far as he was concerned — that is, that the current of electricity could be turned on without injury to him, and that he did not thereby mean, necessarily, that he had located and remedied the trouble. The report further showed "All O. K. at 4:55 P. M. except No. 18–32 up town." Where No. 18 was or what was done with reference to it does not appear in the abstract of the record. The report further shows, as above indicated, "No. 32 O. K. at 5:15 P. M." After that report was received nothing further was done looking towards ascertaining whether the line was "clear" or whether the trouble had been remedied, but without making any further tests the current of electricity was turned on at 7:25 P. M. The testimony disclosed that the "voltage," meaning the force or pressure of the electricity, was 3,300 volts, and the "amperage," meaning the quantity of electricity sent over the wire under such pressure was six and one-half amperes, and that one-fourth to one-half of an

ampere in quantity transmitted under a pressure of 1,000 volts or pressure is fatal to human life.

The deceased returned to his home only a few minutes before his death, say about 7 o'clock P. M. The boy, and some of his boy friends, were playing in the front yard. The deceased ordered his boy to go into the house and stay there and told the other boys to go home. It had been raining that day and was quite damp. After going into the house his boy again went out in the front yard. About ten minutes before the accident, the boy noticed that the electricity had been turned on, and that the light at Tenth and Woodland was burning, though not as brightly as usual. He further noticed that the tree aforesaid commenced to burn. The boys, who had been ordered away, called his attention to the fact that the tree was burning. He caught hold of the wire to pull it down, and it shocked him. He then went around the house and got an ax and chopped the wire in two about four feet from the ground, where it ran down on the side of the tree on the inside of the yard. He then noticed that one of the wires still continued to burn. He stood there watching it, and his father came out of the house a second time and ordered him to go in the house. The deceased then walked towards the swing and took hold of it, and was instantly killed. The boy says that from the time the current of electricity was first turned on until his father was killed there was an interval of only about fifteen minutes. The boy says he did not warn his father against taking hold of the steel rope of the swing, because he did not have time

substance is a conductor of electricity, varying somewhat in the character of the conductor; that electricity will always follow the best conductor, although some of it may be diverted from the arc wire even by a less efficient conductor. The evidence adduced by both parties further shows, and it is admitted by counsel, that where there is only one "ground" it is harmless, and that in order to produce injury there must be two "grounds," and that when there are two "grounds," if a person comes in contact with one of them, his body will form a part of the circuit through which the electricity will pass, and if the electricity is of sufficient force and quantity it will result in injury. Mr. Richardson, the general manager of the defendant, testified, on cross-examination, that if there were two "grounds" and the wire had not been cut by the boy, as above described, but had been allowed to remain "grounded" or to lie on the ground, a current of electricity would have flowed over the copper wire, and if a man took hold of the copper wire the electricity would pass through his body.

This is a sufficient statement of the facts, and there is no substantial controversy about them. Upon this showing, the defendant claims: First, that even conceding that there was another "ground" and that the defendant was negligent in not discovering and remedying it, nevertheless, that negligence of the defendant was not the proximate cause of the injury, but that the cutting of the copper wire by the boy was the proximate cause of the injury, and that act having been done after the current of electricity was turned on, and when it was impossible to test the wire for "grounds," the defendant is not liable; second, that the defendant was only bound to exercise ordinary care and vigilance, that it owed no duty to the deceased, and that the injury was caused by the unexpected, unanticipated, and heretofore unheard of extraordinary act of a trespasser, for which the defendant is not liable; third, that the court erred in giving erroneous instructions for the plaintiff; and fourth, that the court erred in admitting incompetent evidence offered by the plaintiff.

1. The first contention of the defendant is that even conceding that there was another "ground," and that the defendant was negligent in not discovering or remedying it, nevertheless, that negligence of the defendant was not the proximate cause of the injury, but that the cutting of the copper wire by the boy was the

proximate cause of the injury, and that act having been done after the current of electricity was turned on, and when it was impossible to test the wire for "grounds," the defendant is not liable. The case has been remarkably well briefed and argued by counsel on both sides. A multiplicity of cases, both from this and other States, have been cited by counsel on both sides, and the question of proximate cause has been very thoroughly gone over. It would be impossible in a single opinion to review the cases and analyze fully the law as declared by the many decisions and the text-writers bearing upon this question. The proposition of law involved has been so often discussed and decided by this court that it is unnecessary to look elsewhere for authority. The law is well settled in this State that the doctrine of comparative negligence does not obtain in this State. The doctrine of concurrent negligence is firmly rooted in the jurisprudence of this State. The law is well settled in this State that "a defendant may be liable even if the accident was not caused by his sole negligence. He is liable if his negligence concurred with that of another, or with the act of God, or with an inanimate cause and became a part of the direct and proximate cause, although not the sole cause." *Newcomb v. Railroad,* 169 Mo., *loc. cit.* 422, 6[illegible] S. W. 348 *et seq.*, and cases cited. In *Brash v. St. Louis,* 16[illegible] Mo., *loc. cit.* 437, 61 S. W. 808, the negligence of the city complained of combined with the act of God. BRACE, J., speaking for the court, quoted the rule laid down in 1 Shearman & Redfield on Negligence (5th ed.), § 39, as follows:

127, 40 S. W. 653, the negligence of the city complained of consisted in permitting a small depression to remain in the street at the end of a bridge across a railroad track, which, under ordinary circumstances, would have been safe for public travel. Combined with this condition was the fact that an engine passing under the bridge suddenly emitted an unusual quantity of steam, thereby frightening the plaintiff's team and causing it to run away and injure the plaintiff. A recovery against the city was sustained on the ground that, although the act of the city in permitting the depression to remain in the street would not, ordinarily, have been productive of any injury, yet when it combined with the other independent, intervening cause — the emitting of steam from the engine — it was one of the direct and proximate causes of the injury. In *Bassett v. St. Joseph,* 53 Mo. 290, 14 Am. Rep. 446, the negligence of the city consisted in leaving an excavation adjacent to a market place. The street, exclusive of the excavation, was sufficient for ordinary passage. The plaintiff was passing along that portion of the street when a mule kicked at her. To avoid being kicked she dodged and fell into the ditch. The city was held liable notwithstanding its negligence would not ordinarily have produced the injury, but because when combined with the independent, intervening cause — the kick of the mule — it was one of the proximate causes of the injury. In *Brennan v. St. Louis,* 92 Mo. 482, 2 S. W. 481, the negligence of the city consisted in not repairing a ditch which had been washed across the street and sidewalk by the rain. The plaintiff, a three-year-old child, with her sister, thirteen years old, who was pushing a baby carriage with a baby in it, was passing along the sidewalk close to the ditch, when another little girl came up, stumbled against the plaintiff, and both fell in the ditch, and the plaintiff was injured. The city was held liable because its negligence concurred with the independent, intervening cause, and was one of the proximate causes of the injury. Many other cases in this State might be cited illustrative of the rule in reference to concurrent negligence constituting proximate cause, but the foregoing cases are sufficient to demonstrate that if a defendant is negligent and his negligence combines with that of another, or with any other independent, intervening cause, he is liable, although his negligence was not the sole negligence or the sole proximate cause, and although his

negligence, without such other independent, intervening cause, would not have produced the injury.

Applying these rules to the facts in judgment the defendant must be held liable. It is conceded that if there was only one "ground" no damage would result to a person coming in contact with the substance constituting the "grounding" of the current. Or, in this case, that if there had been no other "ground" except that created by the son of the deceased making the connection with the arc wire, no injury would have resulted. It is conceded that there must be two "grounds" in order to produce injury. Hence it follows that there must have been some other "ground" at some other place than that made by the son of the deceased, as aforesaid. The testimony discloses that at some time after 2 P. M. — the defendant claims the fact to be that it was at 4:55 P. M. — the defendant discovered that there was a "ground" on circuit No. 32, and sent out a man to locate it and remedy it. That man says he started at some time between 2 and half-past 3 P. M. The record of the defendant, introduced in evidence, recites that: "All O. K. at 4:55 P. M., except 18–32 up town." The defendant claims that this was the time the boy made the connection with the wire aforesaid. Conceding this to be true, and conceding that the lineman started to discover the trouble at 4:55 P. M., the evidence discloses the fact to be that he made tests at only three points that he can designate, covering a space of two miles, and at a point other than in front of the Harrison residence. How far it was from the Harrison residence is not disclosed. The evidence

tricity could be turned on without injury to him, as he had quit experimenting. The evidence further discloses that such tests cannot be made while the current of electricity is on the wire. After receiving the report at 5:55 P. M., the defendant, so far as this record discloses, made no further attempt to discover whether the line was "clear" before it turned on the current of electricity at 7:25 P. M.

The defendant contends that if there was only one "ground" no damage would result to any one, and this is conceded by the plaintiff. Upon this basis the defendant further claims that even if it had not detected and remedied the "ground" made by the son of the deceased before it turned on the current of electricity, no damage would have ensued unless there had been some other "ground" also existing. Assuming this to be true, the question is whether the defendant was guilty of negligence in turning on the current of electricity at 7.25 P. M., without making any other tests to discover whether there was trouble on the line. It is conceded that it would only take four to five minutes to make such a test. Reduced to its last analysis, therefore, the fact is that at some time before the current of electricity was turned on, the defendant knew that there was trouble on the line — that is, that there were one or more "grounds." It sent out one of its linemen to remedy it. That lineman did not do so. The trouble continued; the current of electricity was turned on, and the accident ensued. Whatever may have been understood by the servants and officers of the defendant as to the true meaning of the report sent in by the lineman at 5.55 P. M., the fact remains that the trouble had not been remedied, and the defendant had ample time in which to have done so, or else it should not have turned on the electricity until it knew that the trouble had been remedied. The negligence of the lineman was the negligence of the defendant, and if he failed to report the fact that he had not discovered and remedied the trouble, his failure is imputable to the defendant. Under the circumstances, there is no escape from the conclusion that the defendant was negligent in turning on the current of electricity after it knew that there was trouble, without making a test at the main office to discover the true state of affairs, and without positively knowing that the trouble had been remedied. The fact that its negligence would not have resulted in the injury

complained of except for the independent intervening negligence of the son of the deceased does not relieve the defendant from liability, for the act of the son of the deceased could not have produced the injury unless the defendant had turned on the current of electricity, nor unless there had also been a second ground somewhere else. The defendant's negligence was, therefore, a direct and proximate cause, or one of the direct and proximate causes, which concurred with the act of the son of the deceased to produce the injury, and under the rule in this State the defendant is liable.

2. The second contention of the defendant is that the defendant was only bound to exercise ordinary care and diligence; that it owed no duty to the deceased, and that the injury was caused by the unexpected, unanticipated, and heretofore unheard of, extraordinary act of a trespasser, for which the defendant is not liable. The testimony discloses that never before had any one so attempted to make a connection with an arc wire in Kansas City, Mo., but that this defendant had had an experience of that sort with respect to the part of its system located in Kansas City, Kan. As to this defendant, therefore, it cannot be said that the act of the son of the deceased in making the connection was an unheard of unprecedented act. The defendant contends that it owed no duty to the deceased. This contention is untenable. It employed one of the most insidious and dangerous agencies known to man. Electricity is more powerful for good and for evil than any other agency known to mankind. It is the most dangerous form of

experience, was decided adversely to that contention by this court in *Hoepper v. Southern Hotel Co.,* 142 Mo., loc. cit. 388, 44 S. W. 259. It was there said:

"It is true, the negligent act must, in all cases, be the proximate cause of the injury in order to make the actor responsible therefor. But if the injury follows as a direct consequence of the negligent act of omission, it cannot be said that the actor is not responsible therefor because the particular injury could not have been anticipated. A neglect to anticipate and guard against that which no reasonable man would expect to occur may not be negligence. 'If the wrong and the damage are not known by common experience to be usual in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, the wrong and damage are not sufficiently conjoined or concatenated as cause and effect to support the action.' [Citing cases.] But in case the negligence is shown, 'and the injurious consequences are immediate, and flow directly from the negligent act, the person guilty of the act will not be excused for the reason that the particular consequences were unusual, and could not ordinarily have been foreseen.' *Graney v. Railroad,* 140 Mo. 98, 41 S. W. 246, 38 L. R. A. 633; 16 Am. & Eng. Enc. of Law 432, and cases cited. In *Smith v. Railroad,* L. R. 6 C. P. 20, it is said by CHANNELL, B.: 'I quite agree that where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence of negligence for the jury or not; but when it has been determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.' * * * So the evidence tends to prove the negligence, and that the injury was the direct result thereof. It could make no difference whether or not defendant could have anticipated the particular injury."

The same doctrine is laid down in *Graney v. Railroad,* 140 Mo., loc. cit. 98, 41 S. W. 246, 38 L. R. A. 633; *Miller v. Railroad,* 90 Mo., loc. cit. 395, 2 S. W. 439; *Geissman v. Electric Co.,* 8 Am. Electl. Cas. 569, 173 Mo. 654, 73 S. W. 654; *Winkelman v. Electric Light Co.,* 9 Am. Electl. Cas. 335, 110 Mo. App. 184, 85 S. W. 99; *Morrison v. Railroad,* 27 Mo. App. 418; *Meade v. Railroad,* 68 Mo. App., loc. cit. 101. And also obtains in other jurisdictions. *Griffin v. Electric Light Co.,* 164 Mass., loc. cit. 493, 41 N. E. 675, 32 L. R. A. 400, 49 Am. St. Rep. 477; *McLaughlin v. Electric Light Co.,* 6 Am. Electl. Cas. 255, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812; *Ennis v. Gray,* 5 Am. Electl. Cas. 325, 87 Hun (N. Y.) loc. cit. 357, 34 N. Y. Supp. 379; *Higgins v. Dewey,* 107 Mass. 494, 9 Am. Rep. 63. See, also, 21 Am. & Eng. Enc. of Law (2d ed.) 487 *et seq.* The defendant relies upon *Fuchs v. St. Louis,* 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136; *Chandler v. Gas Co.,* 174 Mo. 321, 73 S. W.

502, 62 L. R. A. 474, 97 Am. St. Rep. 570, and *Paden v. Van Blarcom,* 181 Mo. 117, 74 S. W. 124, 79 S. W. 1195. Those cases, however, are easily distinguishable from the cases cited, and from the case at bar, in this, that in none of them was any act of negligence on the part of the defendant shown, or else the jury was required to find that the defendant had been negligent. Those cases are of such recent date that a close analysis thereof is not necessary to further demonstrate their inapplicability to the case at bar. In the *Fuchs Case* there was absolutely no evidence of negligence on the part of the city. In the *Chandler Case* the same was true, but the negligent act which caused the injury was solely attributable to a third person, and the defendant had no knowledge of it, and such an act had never before been experienced by it in the conduct of its business. A similar independent, intervening cause had been experienced by this defendant prior to this occasion. The *Paden Case* passed off entirely upon the theory that the court could not say, as a matter of law, whether or not the defendant was guilty of negligence under the circumstances, but that it was a question for the jury under the facts in judgment there. And the court in that case distinctly held that the decision in the *Fuchs Case* was not in conflict with anything said in that case.

3. The next contention of the defendant is that the court erred in giving erroneous instructions for the plaintiff. The only instruction given for the plaintiff, which is set out in the abstract of the record, is as follows:

"If the jury believe from the evidence that on the morning of the 9th day

tricity under the circumstances aforesaid as claimed by the plaintiff to have existed, and you find that each and every one of such circumstances did exist; and if you further find that by reason of such a diversion of the whole or a part of such a current under such circumstances, if so diverted under such circumstances, the whole or a part of such diverted current passed through and into the body of Francis M. Harrison and killed him, without contributory negligence on his part, and that the diversion of such a current so transmitted was the proximate cause of the death of Francis M. Harrison, and that such death was due to the want of such ordinary care and prudence on the part of the defendant or its employees, under all the circumstances found by you to exist; and you further believe that the plaintiff on said day was the wife of said Harrison and suffered pecuniary loss from his death, your verdict should be for the plaintiff."

It is objected that this instruction is erroneous because it made the defendant responsible if the jury found that somebody was liable to divert the current, or if there was a probability that it would be diverted, or if "the current was transmitted under the circumstances claimed by the plaintiff, and thus referred the jury to the indefinite proposition as to what the plaintiff might claim;" that it submitted to the jury the question of what was the proximate cause of the death, and that it assumed as a fact that two "grounds" existed. This criticism is not well taken. It was conceded by both parties that the current of electricity was not only liable to be dangerous to human life, but was certainly dangerous to human life if two "grounds" existed, and both sides admit that unless two "grounds" had existed, no injury would have resulted in this case, and as an injury did result, under the concession on both sides, it follows that two "grounds" must have existed. The instruction, in speaking of the liability of the current being diverted, or of the probability of its being diverted, had reference entirely to the condition of the wire with respect to the abrasure of the insulation, which was shown to have existed for at least a month before the date of the accident, and simply required the jury to find whether or not the defendant had exercised reasonable care and prudence in ascertaining and remedying such condition if it existed, and was, therefore, unobjectionable in that respect.

The objection that it left the jury to hold the defendant liable if they found that the current was transmitted under the circumstances claimed by the plaintiff, and thus referred to the jury the indefinite proposition as to what the plaintiff might claim, arises entirely from overlooking the fact that the instruction used the

word "aforesaid" and required the jury to find that the current was transmitted "under the circumstances aforesaid as claimed by the plaintiff to have existed (and you find that each and every one of such circumstances did exist). Thus the instruction referred to the prior predicates therein, and did not give the jury such a roving commission as counsel refer to. The last objection to the instruction is that it left the jury to determine the proximate cause of the death. The instruction specifies all the facts which the jury were required to find in order to make the defendant liable, and then told them that if they found "that the diversion of such current so transmitted was the proximate cause of the death of Francis M. Harrison, and that such death was due to the want of ordinary care and prudence on the part of the defendant or its employees, under all the circumstances found by you to exist," etc. Used in this connection, after having first defined to the jury all the facts that it was necessary for them to find, in order to make the defendant liable, the use of the term "proximate cause" certainly could not have misled the jury under the facts in judgment here. The facts are practically undisputed. Under those facts the defendant is liable. The verdict of the jury, therefore, simply announces a conclusion, as to the facts concerning which there is no dispute, and under which the law imposes a liability on the defendant. The instruction, therefore, could not have misled the jury to the defendant's prejudice, and could have had no effect upon the merits of the case, and therefore the use of the words "proximate cause" in that instruction does not constitute reversible error. But, on the contrary, the use of the term "proximate cause" in an instruction has been expressly sanctioned by this court. *Anderson v. Railroad,* 161 Mo., loc. cit. 428, 61 S. W. 874.

4. The last contention of the defendant is that the court erred in admitting incompetent evidence offered by the plaintiff. The testimony here claimed to have been incompetent is the testimony of the witness Newkirk, a consulting electrical and mechanical engineer, to the effect that there are well-known methods of preventing accidents like that here involved, which provide the line of wires with "loops," so that when trouble or a "grounding" is found to exist on any part of the system, that portion of the system where the trouble exists may be disconnected from the

balance of the system and thereby enable the lighting company to turn on the current of electricity and furnish lights to all parts of the system except that where the difficulty or trouble exists. This witness further testified that the "magneto" employed by the defendant was not the most effective or delicate instrument for detecting trouble or "grounds" on its lines, and that it would not enable the servants of the defendant to ascertain the location of the trouble when applying the test at the main office, and that there was an instrument called a "galvanometer," which is a much more delicate instrument than the "magneto," and by which not only the question of whether there is a "ground," but also how many "grounds" exist, and the location of each, can be ascertained at the main office. At first the court, over the objection of the defendant, permitted the testimony as to the galvanometer to go in, but afterwards, on the defendant's objection, the court excluded that testimony and instructed the jury not to consider it in making up their verdict. As to the action of the trial court in first admitting and afterwards excluding the testimony as to the galvanometer, it was clearly not error. To hold otherwise would be to establish the rule of practice that when a court made a mistake and admitted incompetent testimony, and afterwards discovered that it had done so, it could not effectually correct the error by instructions to the jury, but that in order to remove the sting of the error it would have to discharge the jury and award a new trial before a new venire. Such a rule could not reasonably be expected to be announced by any court. When a trial court becomes satisfied that it has erred in the admission of testimony, all that it can do is to instruct the jury to disregard it, and the presumption is that the jury did disregard it. It is not easy to perceive what injury the testimony of the witness as to the loops aforesaid did the defendant in this case. The testimony shows that the test disclosed the fact that there was trouble on circuit No. 32; that defendant sent out a lineman to locate it and correct it; that the lineman, instead of doing so, made a wholly insufficient test, and then, without fully investigating, concluded that the trouble was on the trunk line and not on circuit No. 32. If the defendant, therefore, had had a system of such loops, the lineman would not have disconnected circuit No. 32 from the trunk line for the reason that he had concluded

that the trouble did not exist on circuit No. 32. If the trouble existed on the trunk line, as the lineman concluded was the fact, it would not have been necessary to disconnect circuit No. 32, but would have been necessary to turn off the current of electricity on the trunk line. As hereinbefore pointed out, the negligence of the defendant in this case consists in its failure to ascertain, by means within its reach and at hand, whether the line was "clear" before it turned the current of electricity at 7.25 P. M., onto the trunk line, from which it was distributed to the various lamp loop lines, including No. 32.

Under the circumstances in this case, therefore, the question of whether it had or had not such loops, as were described by the expert witness, could have no possible bearing upon the defendant's liability, or upon the merits of this case. The law does not require the defendant, or any one else, to adopt any particular appliance. All that the law requires is that the appliances adopted by the defendant shall be reasonably safe. If they are not, the defendant is liable. Not because it did not adopt better appliances, but because those it did adopt and use were not reasonably safe for the purposes for which they were used. The evidence of this witness as to the loops should not, therefore, have been admitted, but it is impossible that it could have had any effect whatever upon the verdict of the jury in this case, nor could it in any manner have affected the negligence of the defendant in turning on the current of electricity at 7.25 P. M. without using the tests it had to find out whether the line was "clear"

no difference in this case that the boy was the son of the deceased. The legal consequence is the same as if it had been done by an entire stranger to the deceased.

For these reasons the judgment of the Circuit Court is affirmed. All concur.

WELLS v. NORTHEASTERN TELEPHONE CO.

Maine Supreme Judicial Court — April 9, 1906.

101 Me. 371, 64 Atl. 648.

LIGHTNING ENTERING BUILDING OVER TELEPHONE WIRE — EVIDENCE — EXERCISE OF DUE AND ORDINARY CARE. — 1. The plaintiff recovered a verdict of $804 for the destruction of her barn and its contents by fire alleged to have been caused by the negligence of the defendant company in the construction and maintenance of its telephone line past the plaintiff's premises on the west side of the highway in the town of Avon. One of the defendant's poles upon which its line wires were suspended, was erected within about five feet of the northeast corner of the plaintiff's barn, and a guy wire consisting of a piece of ordinary telephone wire was stretched from the pole to the corner of the barn. There was no lightning arrester, or other appliance connected with this guy wire or with the telephone wires in that vicinity, to divert powerful currents to the earth at the time of thunderstorms. Immediately before the fire, a thundershower came up in the vicinity of the plaintiff's buildings, and there was a discharge of lightning of extraordinary violence. A board on the corner post of the northeast corner of the barn was newly split from a point a little above where the guy wire was attached downward nearly to the sill. When first seen, the fire was in this corner of the barn directly beneath the point where the guy wire was connected with it, and there was no indication that the barn was struck by lightning at any other point. The plaintiff's theory in substance was that a fragment of the lightning struck the telephone wires near by and that an electric current was eventually conducted by means of the guy wire to the corner of the barn which was thus ignited. The defendant's theory was that the barn was destroyed by lightning which descended directly from the clouds

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Lightning Entering Buildings over Wires. — See 8 Am. Electl. Cas. 591-610, and notes.

Other cases in this volume relating to injuries from lightning. Lightning proximate cause of injury, see *Quincy Gas & Electric Co. v. Schmitt, post; Evans v. Eastern Kentucky Telephone & Telegraph Co., post.* Injury to horses from lightning passing over defective telephone wires, see *Southwestern Telephone & Telegraph Co. v. Morris, post.* Injuries from lightning entering building over telephone wires, see *Owen v. Portage Telephone Company, ante; Cumberland Telephone & Telegraph Co. v. Floyd, ante; Southern Bell Telephone & Telegraph Co. v. Parker, post.*

and communicated the fire without the intervention of any of its telephone wires. Expert evidence in support of both theories was offered and admitted.

In view of the admitted limitations of human knowledge respecting the laws of electricity and the immeasurable potential of a lightning discharge, the opinions of electricians in regard to its possibilities in a given case cannot be adopted with the same confidence as expert opinions based upon the knowledge of the more exact sciences; and in view of the manifest effects of the lightning upon the telephone poles and the corner board of the barn in the case at bar, *held*, that the evidence warranted the jury in following the conclusion of those experts who believed that the destructive spark was conveyed to the corner of the barn by the telephone wires, in preference to those who testify that the barn was struck by a branch of a lightning bolt discharged directly from the clouds.

2. If the plaintiff's theory is correct that it was not safe or suitable construction to connect the guy wire with the barn without a lightning arrester or circuit breaker, then the evidence warranted a finding by the jury that the defendant company did not exercise reasonable and ordinary care in establishing its line at the point in question.

3. If the defendant's theory is correct that it is utterly impracticable to divert lightning currents from such a wire to the earth by means of any insulators or circuit breakers hitherto devised, it cannot be said to be manifest error on the part of the jury to find that such wire should not have been attached to the barn at all, and that in making such a connection, the defendant, if possessed of scientific knowledge to sustain its theory, did not act with proper regard for the rights of the plaintiff and the safety of her property.

4. The defendant was not obliged by law to guarantee the safety of its system under all possible conditions and circumstances, but it was required to exercise that due and ordinary care which the present state of scientific knowledge, as well as common observation of the nature of electricity and the enormous power of lightning would suggest as reasonably necessary for the protection of life and property along its line.

(Official.)

fendant was negligent in the construction and maintenance of its telephone line. The defendant contended that the barn was struck by lightning which descended directly from the clouds and communicated the fire without the intervention or conduction of any of the telephone wires, and that there was no negligence in the construction and maintenance of its wire line.

The action was tried at the September Term, 1904, of the Supreme Judicial Court, Franklin county. Plea, the general issue. Verdict for plaintiff for $804.68. The defendant then filed a general motion to have the verdict set aside. The defendant also took exceptions to the refusal of the presiding justice to give certain requested instructions, but these exceptions were not insisted upon at the law court.

All the material facts are stated in the opinion.

Before EMERY, WHITEHOUSE, POWERS, PEABODY, and SPEAR, JJ.

F. W. Butler and *E. E. Richards,* for plaintiff.

Foster & Foster and *Joseph C. Holman,* for defendant.

Opinion by WHITEHOUSE, J.:

The plaintiff recovered a verdict of $804 for the destruction of her barn and its contents by fire alleged to have been caused by the negligence of the defendant company in the construction and maintenance of its telephone line past the plaintiff's premises on the west side of the highway in the town of Avon. The case comes to this court on the defendant's motion to set the verdict aside as against the weight of evidence. The exceptions are not insisted upon.

The defendant's line wires appear to have been suspended upon poles in the ordinary manner, one of the poles being erected within about five feet of the northeast corner of the plaintiff's barn. There was a curve in the road at this point and to counteract the tendency of the line wire to draw this pole from its vertical position, a guy wire, consisting of a piece of ordinary telephone wire, was stretched from the pole to the corner of the barn. One end of this guy wire appears to have been wound around the pole at a point about two feet below the telephone wires, and the other end attached to the barn by means of a lag screw driven into the corner post a short distance below the eaves. There was no lightning arrester, or other appliance connected with this guy wire or with the telephone wires in that vicinity, to divert powerful currents to the earth at the time of thunderstorms. Immediately before the fire on the morning of August 22, 1903, a thunder-

shower came up in the vicinity of the plaintiff's buildings. The rainfall was light, but it was followed by a discharge of lightning of extraordinary violence, though but a single flash of light was observed. About 650 feet north of the barn a large elm tree was standing on the easterly side of the road with its branches overhanging the traveled way and extending nearly to the telephone wires on the westerly side. The lightning struck this tree near the top, and ran down almost the entire length of it, splitting off a large branch nearly to the ground, and striping off some of the bark. One part of this electric discharge then appeared to cross the street under the telephone wires, while another part ran along a wire fence.

Of the eleven telephone poles in the line extending northerly from the barn about 1,800 feet, four, namely Nos. 1, 3, 4, and 10, counting from north to south were evidently shattered or slivered by the action of some part of this same electric discharge, while the other seven poles did not appear to have been injured by the lightning. Nor was there any distinct evidence of such injury to the pole at the corner of the barn or to any pole south of the barn. But the board on the corner post at the northeast corner of the barn was newly split from a point a little above the lag screw, to which the guy wire was attached, downward nearly to the sill. When first seen the fire was in this corner of the barn directly beneath the point where the guy wire was connected with it, and there was no indication that the barn was struck by lightning at any other point.

Upon this state of facts it was the theory of the plaintiff that a fragment of the lightning bolt which shattered the elm tree, struck the telephone wires in close proximity to the overhanging branches; that an electric current was conducted by these wires to the most northerly pole that was found to be slivered, and in the opposite direction, past the most southerly pole that was splintered, to the pole at the corner of the barn; and that a current then passed into the guy wire; and thence by the wire to the corner of the barn which was thus ignited.

On the other hand, the defendant company claims that of the three different general forms in which lightning may be discharged from the clouds to the earth; namely, the nearly direct line, the zigzag or angular course and the form of the inverted tree, the

discharge in this case assumed the form of the branches of an inverted tree; that some of these branches struck the elm tree and the four telephone posts, independently of each other; that one of these fragments in like manner struck the corner of the barn, and thus directly caused the fire; and that no electric current was conducted in either direction by the telephone wires, and that none passed over the guy wire to the barn.

The defendant's theory is that the plaintiff's barn was destroyed by lightning which descended directly from the clouds and communicated the fire without the intervention or conduction of any of its telephone wires; and the company accordingly contends in the first place that nothing in the construction or maintenance of its telephone line past the plaintiff's premises can be deemed the proximate cause of the plaintiff's loss.

In support of the plaintiff's theory, attention is called not only to the manifestations of the lightning stroke actually observed at the time in question, and the facts already stated in regard to the shattered poles of the telephone line and the riven board at the corner of the barn where the guy wire was attached, and the fire was first seen; but also to the testimony of three electricians who gave evidence as experts upon the questions involved. Mr. Mallett for twelve years an instructor in electrical science and a civil engineer does not controvert the proposition that lightning may be discharged to the earth in the form of the branches of an inverted tree, and is of opinion that when the lightning struck the elm tree in this case there might have been a secondary discharge which struck the telephone wires or pole and then followed the wires, and passed to the earth by the best conductor it could find; but in his judgment a discharge in the form of the branches of a tree, or in any other form, would not be so widely diffused as to strike objects more than 200 feet distant from the principal charge. He also states that it is in accordance with his actual observations in a similar instance cited by him, that lightning will follow telephone wires or a wire fence, and shatter some of the poles or posts, and jump over and leave untouched others in the same line.

Mr. Whitney, electrical engineer for twenty years, corroborates these statements, and refers to his own observation of poles in a telephone line, shattered by lightning which left the wires, though

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Mr. Berry who had been engaged in the electric for seventeen years, a portion of the time as insp and had made a special study of electrical constru plains in answer to interrogatories that in case of discharge of lightning upon three telephone wire tional part of it which those wires would be able to be very small for the reason that the potential of lig never calculated, is supposed to be "up in the mil that in such a case the tendency of the electricit split and go in both directions, and if it was wet from one pole to the other, the poles acting as light that it would jump from the wires or brackets to thence, pass to the ground; that it would be liable of the poles, but if a pole was particularly dry and further away, it might not jump down to the pole testified as follows:

> "Electricity goes by the best conductor, and as long as insulated properly the current will be conveyed on that wi tion. * * * When we deal with lightning, that is some rule for, and it will go down a tree or any other object, and different objects; but the amount that the tree will carry or any wire will carry is hardly in our province to know. never known a discharge of lightning by different branches points more than 100 feet distance."

On the other hand, two electric engineers for th

on the same line and placed about 125 feet apart were struck by the same stroke of lightning. He testifies that if lightning struck the elm stree, it would not leave the overhanging branches and pass to the telephone line on the opposite side of the road, for the reason that it would naturally take the path of least resistance along the branches to the trunk of the tree and down the trunk to the earth. He failed to find any evidence that lightning had passed down the pole to the guy wire at the corner of the barn, and in his opinion the barn was struck by a branch of the lightning discharge which struck the large tree and the several poles mentioned, and was not ignited by any current which was conveyed by the telephone wires. The fresh crack in the board at the corner of the barn to which the guy wire was attached, in the absence of any similar mark on the pole, in his judgment has no necessary tendency to show that the electric current came in over that wire.

Mr. Fickett, the city electrician of Portland, who had been engaged for twelve years in work pertaining to electricity, corroborates Mr. Mather, and compares the spreading of a discharge of lightning as it nears the earth to the bursting of a falling rocket that has been projected into the air. In his experience, lightning does not ordinarily leave an insulated wire, and pass down a pole on which the wire is supported, and in his opinion the barn and the poles and the elm tree were all struck by branches of the same bolt of lightning.

In view of the admitted limitations of human knowledge respecting the laws of electricity and the immeasurable potential of a lightning discharge, the opinions of electricians in regard to its possibilities in a given case cannot be adopted with the same confidence as expert opinions based upon knowledge of the more exact sciences; and in view of the manifest effects of the lightning upon the telephone poles and the corner board of the barn in this case, it is the opinion of the court that the evidence warranted the jury in following the conclusions of those experts who believed that the destructive spark was conveyed to the corner of the barn by the telephone wires, in preference to those who testify that the barn was struck by a branch of a lightning bolt discharged directly from the clouds.

In *Southern Bell Tel. Co. v. McTyer*, 8 Am. Electl. Cas. 591, 137 Ala. 601, 34 So. 1020, 97 Am. St. Rep. 62, the court said:

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Electl. Cas. 335, 88 Wis. 243, 60 N. W

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at the corner of the barn, but the main wire was directly connected with the barn by means of an insulated oaken bracket spiked to the corner post, and that this was done by the express consent of Mr. White, the owner of the premises at that time. But when the line was reconstructed by the defendant company the pole was erected near the barn, and the guy wire attached to the corner of it as heretofore explained, and Mr. White, who still owned the property, says he told the man who was working on the wire that he "thought it wasn't right." It appears, however, that the connection of the wire with the barn as made was acquiesced in by Mr. White, without further question, for nearly four years thereafter, and it is not suggested that any objection has ever been made by this plaintiff during the year of her ownership before the fire.

It also appears that the defendant constructed its line past the plaintiff's premises without first obtaining a written permit from the selectmen of the town as required by section 17 of chapter 55 of the Revised Statutes. But this fact obviously did not contribute as one of the real and proximate causes of the plaintiff's loss. *Cumberland Co. v. Tow Boat Co.*, 90 Me. 95, 37 Atl. 867, 60 Am. St. Rep. 246. It could not have influenced any of the laws of electricity or meteorology involved in the decision of the case.

In view of these considerations and the fact that in the declaration the plaintiff claims to recover on the ground of negligence, and not upon the assertion of an absolute liability of the defendant for the consequences of a tortious act, the trial of the case proceeded upon the former theory, and two questions were properly submitted to the jury, first, the question already fully considered, whether the fire was caused by electricity passing along and over the telephone wires and the guy wire to the barn, and secondly, whether there was any negligence in the manner of constructing and maintaining its line at the point in question, and especially in connecting the guy wire to the barn without the attachment of lightning arresters or other appliances calculated to prevent a current of electricity of such intensity as to cause fire from entering the barn by means of such wire.

It was incumbent upon the plaintiff then to show in the second place, that in connecting and maintaining a guy wire between the

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ductor then in its general pathway." *Jackson v. Wis.*
Electl. Cas. 335, 88 Wis. 243, 60 N. W. 430, 26 L. R. A. 101.

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SIMMONS v. SHREVEPORT GAS, ELECTRIC LIGHT & POWER CO.

Louisiana Supreme Court — April 9, 1906.

116 La. 1033, 41 So. 248.

MAINTENANCE OF WIRES BY TELEPHONE AND ELECTRIC LIGHT COMPANY — NEGLIGENCE. — Due care requires of those using wires or conductors of electricity so to place and maintain them with reference to similar conducting agencies that dangerous contact be not probable; and where wires maintained concurrently by different parties are so erected or strung that they are likely to touch, possibly with destructive consequences, either or both parties must make efforts to remedy such dangerous condition, and if an injury occurs through the neglect of such duty, both are liable.

(Syllabus by the Court.)

Appeal by defendants from judgments for plaintiffs. *Affirmed.*

Alexander & Wilkinson, for appellant Shreveport Gas, Electric Light & Power Co.

Wise, Randolph & Rendall, for appellant Shreveport Telephone Co.

Hall & Jack, for appellees.

Opinion by PROVOSTY, J.:

The wires of the two defendant companies are on the same side of the street. The telephone company's posts are taller than those of the electric light company, and its wires are strung ten feet higher. For connecting with a house on the other side of the street two of the telephone wires were run slanting downward to a lower post on the same side of the street a distance of about eighty feet, then across the street to the house, then down the side of the house, and finally under the house, two feet from the ground. On their way downward they passed through the fleet of wires of the electric light company. This brought one of them so close to one of the heavily charged wires that the two would touch in oscillating; and the result was that the insulation of the heavily charged wire was either worn off or burnt off, and that the otherwise harmless wire going to the house became itself dangerously charged. This situation had lasted more than nine months, and the telephone had been removed from the house for more than three months, when the accident occurred which has given rise to this suit.

The two little sons of the plaintiffs in these suits while at play near the house came in contact with the wire. Both were knocked senseless, and remained unconscious some time. Young Simmons soon revived. His only other injury was a burn in the hand which necessitated his carrying the member in a sling for two months, and which has left no trace except a large scar across the palm and a slight contraction of the web between the thumb and the forefinger, such as will affect the use of the hand but very little. Young Smullins remained unconscious for four hours. The little finger of his right hand was burnt off entirely; the next finger was so burnt as to have to be amputated just below the first joint; it, or what is left of it, and the middle finger are now bent rigidly inward, useless and deformed, crooking sideways; the end of one a stub, and the end of the other shrunk, and dwarfed, and peaked. In addition to this, his scalp was burned a space some five or six inches in diameter, and through the skin, and through the outer layer of bone, which afterwards sloughed off. Two months after the accident an operation became necessary, and a circle of four or five inches of the dead bone was cut off. At the time of the trial, which was six months after the accident, the physicians thought the wound would heal in about seven or eight weeks; but that grafting might become necessary, and that the place would remain permanently bald.

The defendants are sought to be held responsible *in solido*. The telephone company admits its negligence, and its liability for whatever amount of damages the nature of the case may warrant. It complains however, of the award of the jury as excessive. That award is $500 in the Simmons Case, and $8,150 in the Smullins Case. If the verdict had been somewhat less the court would, perhaps, have liked it better; but it is not so manifestly excessive as to require reduction.

The negligence charged against the electric light company is that it tolerated this faulty and dangerous construction, and thereafter failed to keep its own wires sufficiently insulated to prevent the transmission of the current.

On the side of the company it is argued that it does not suffice for a plaintiff to make his case probable, that he must make it certain, and that the plaintiffs in this case have failed in making their case certain, because, for all that appears, the insulation on

the electric light wire may have been burnt off so recently that the company had not had time to discover the defect; and that this view of the case is rendered all the more probable from the fact that the company's system of construction was of the best and its mode of insulation of the most approved kind; and that the preceding day had been a wet day, when the burning of the insulation might have taken place.

It is further argued that conceding negligence on the part of the electric light company, such negligence was not the proximate cause of the injury; but that the proximate cause was the subsequent intervening and independent act of the telephone company, first, in leaving the wires in position after the removal of the phone, when they had ceased to be of any utility; and, secondly, in not properly insulating them. It is urged that the city ordinances required the telephone wires to be insulated, and that the electric light company had the right to assume that the telephone company would do its duty.

In answer to this argument we will say that, as a matter of fact, it is not true that the situation would have been without danger if the telephone wires had been properly insulated and the phone not removed; the evidence shows the contrary. The construction was originally and in itself so manifestly dangerous that the president of the electric light company says he would have protested against it if he had known of it. Such being the case it can make no difference whether the insulation had worn off or burnt off. Indeed, if the defendant's electrician is to be believed that in wet weather the insulation becomes soft and lets the current through and burns off even on slight contact with another wire, the construction was all the more dangerous, for in that case insulation would have been no protection. But, as a matter of fact, the insulation, whether by rubbing or burning, had been off for some time when the accident happened; the wires were worn bright where they touched, which shows that they must have been rubbing against each other for some time; long enough, surely, for the company to have had ample time in which to have discovered the defect, by proper inspection, and corrected it.

But we prefer to rest the case on the incontestible ground of the failure of the electric light company to have known of and remedied, this defective construction which had been a standing

menace for more than nine months. The law on the subject is well stated in the following excerpt from 15 Cyc. 474, founded in part on the decision of this court in the case of *Hebert v. Lake Charles Ice Co.*, 111 La. 522, 35 So. 731, 64 L. R. A. 101, 100 Am. St. Rep. 505, to wit:

"Due care requires of those using wires or conductors of electricity so to place and maintain them with reference to similar conducting agencies that dangerous contact is not probable; and, where wires maintained concurrently by different parties are so erected or strung that one is likely to fall upon or come in contact with the other, thereby producing possible destructive consequences, either or both of them must make efforts to abate such dangerous condition, and if an injury occurs through a neglect of such duty, both are liable."

The legal situation of electric light and power companies sending this potent fluid along their wires may be illustrated by comparing it to that of a showman conveying a caged tiger through the streets of a crowded city. The showman must not only make sure of the cage, and not himself open the door, but be vigilant in seeing that nobody else opens the door. He could hardly expect that he would be heard to plead that some negligent person had opened the door. Of course, the situation is incomparably more complicated in the case of an electric light or power company with its system of wires pervading an entire city, and the appreciation of the facts in particular cases may be proportionally more difficult; but the principle is the same. Indeed, the prisoner of the company is more sleepless and subtle and in its stroke more quick and sure, whence the need of even greater viligance in keeping it safe within its prison wire.

Under this view of the matter the negligence of the electric light company continued down to the moment of the accident, and hence was its proximate cause.

We have not looked into the complaints against the charge of the judge. They would be no ground for remanding the case even if well founded. Where all the evidence is in the record this court must proceed to pass on the case finally. Hennen, p. 92, No. 5.

Judgment affirmed.

BREAUX, C. J.: I concur in the opinion and decree, and dissent only regarding the amount. I think it is excessive.

GANSTER ET AL. v. METROPOLITAN ELECTRIC CO.

Pennsylvania Supreme Court — April 9, 1906.

214 Pa. 628, 64 Atl. 91.

1. ELECTRIC LIGHT COMPANY — OPERATION OF PLANT — NUISANCE. — An electric light company, a corporation, which so operates its plant as to cause the walls of an adjoining building to shake and crack, and, in time, if the nuisance is persisted in will result in the destruction of the building, is liable in damages.
2. SAME — EMINENT DOMAIN. — A corporation can only injure or destroy property where it possesses the power of eminent domain and exercises that power in the manner provided by statute.

Appeal by defendant from judgment for plaintiffs. *Affirmed.*

Before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, and POTTER, JJ.

Richmond L. Jones, for appellant.

Jefferson Snyder, Cyrus G. Derr, and *Edward S. Kremp,* for appellees.

Opinion by MESTREZAT, J.:

The learned trial judge correctly decided the controverted questions in this case, and the reasons given and the authorities cited in his opinion in discharging the rule for judgment *non obstante veredicto* fully justify his conclusion. This is an action of trespass to recover damages for injuries to the buildings on the plaintiffs' lot caused by the operation of the machinery in the defendant's electric light plant on the adjoining lot. The plaintiffs' allegation here, sustained by the judgment in a former action, is that the defendant company "so attached their works and build-

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Nuisance. — Power house of a railway and light company may constitute a nuisance. *Townsend v. Norfolk Ry. & Light Co., post,* 105 Va. 22, 52 S. E. 910. The connecting of a rail in front of a bank building with an electric battery constitutes a nuisance *per se. Whaley v. Citizens' Nat. Bank, ante,* 25 Pa. Super. Ct. 531. But the transmission of electricity at a high voltage for lawful purposes does not constitute a nuisance *per se. Mull v. Indianapolis & C. Traction Co., post,* 169 Ind. 214, 81 N. E. 657.

The stringing of a live electric wire, contact with which will kill or severely injure, so near a thoroughfare where many people pass that contact with it is possible, constitutes a nuisance. *Wittleder v. Electric Illuminating Co.,* 7 Am. Electl. Cas. 581, 587, note.

ings to ours that in operating its works it grievously injured our buildings and rendered them untenantable." It is claimed, and the evidence tended to show, that the defendant's building was so constructed that the vibration produced by the operation of the ponderous machinery therein "shook the buildings of the plaintiffs, that the shaking was not of the ordinary character, but was of such a nature as to cause the plaster to fall off from the walls, pictures to fall from the walls, windows to rattle, panes to fall out, some cracks in walls, and crockery to fall from shelves or cupboards." In other words, it is alleged, and a judgment of the court below has determined, that the continuous operation of the defendant's light plant will in time result in the destruction of the buildings on the plaintiffs' adjoining lot.

In the absence of authority conferred by its charter, a corporation will not be relieved from liability for special injury to private property resulting from the exercise of its corporate powers. In this respect a corporation occupies the same position and is responsible for its injurious acts to the same extent, that a natural person is. *Rogers v. Philadelphia Traction Company,* 182 Pa. 473, 38 Atl. 399, 61 Am. St. Rep. 716. In that case, Chief Justice STERRETT, in delivering the opinion, says (page 477 of 182 Pa., page 401 of 38 Atl. [61 Am. St. Rep. 716]):

"There is certainly nothing in its [traction company's] charter to relieve the defendant from liability for the special injury which the plaintiff has suffered in consequence of its operations on its own land, as determined by the verdict. As an artificial person it cannot, any more than a natural person, escape liability for special injury done to others, unless it can be shown that, because it is a mere creature of the law, it enjoys immunity from liability which natural persons do not; but no such proposition as that has ever been recognized in any well-considered case. No authority for it can be found in *Pennsylvania Railroad Co. v. Lippincott,* 116 Pa. 472, 9 Atl. 871, 2 Am. St. Rep. 618; *Pennsylvania Railroad Co. v. Marchant,* 119 Pa. 541, 13 Atl. 690, 4 Am. St. Rep. 659, or any of that line of cases. It is not only untenable in law, but it is lacking in reason. If several individuals had purchased the defendant company's lot and erected thereon the machinery and appliances that it did, and had operated the same as it has done to the great and manifest special injury of the plaintiff, no one would venture to question their liability to respond in damages."

The defendant corporation was clearly liable for the nuisance committed against the plaintiffs in the operation of its plant. The learned counsel for the defendant company bases its right to immunity for the commission of the nuisance on the ground that

"If the annoyance or damage arising from such nuisance is such as to destroy or substantially impair the legitimate use and enjoyment of private property, and so amount to a taking, the person injured is entitled to redress, notwithstanding the legislative authorization."

The acts complained of here, it will be observed, are not mere trifling annoyances or discomforts created by smoke or noise or dust resulting from the operation of the plant, but were real and substantial injuries to the plaintiffs' building, causing its walls to shake and crack, and, in time, if the nuisance is persisted in, necessarily resulting in the destruction of the building. No person's property can in this State be taken, injured, or destroyed without compensation, and a corporation can only injure or destroy property when it possesses the power conferred by the State and exercises that power in the manner provided in the statute. Until the defendant company, therefore, has exercised its alleged right of eminent domain and by the authority thereof acquires plaintiffs' property, its illegal acts resulting in a substantial impairment and, finally, in the destruction of the property, constitutes an actionable nuisance for which it is liable in this action. This case is not ruled by *Pennsylvania Railroad Company v. Lippincott,* 116 Pa. 472, 9 Atl. 871, 2 Am. St. Rep. 618, and *Pennsylvania Railroad v. Marchant,* 119 Pa. 541, 13 Atl. 690, 4 Am. St. Rep. 659, relied on by the defendant's counsel to support his position. In that case the injuries were caused by the noise, smoke, and dust from the defendant company's engines and cars used in operating its railroad on a viaduct on its own land on the opposite side of a street from the plaintiffs' premises. Here the defendant company erected its plant on land purchased for the purpose and in immediate contact with the plaintiffs' buildings, and so constructed the foundation and floor of its building that the operation of the heavy machinery resulted directly in destroying the use of the plaintiffs' buildings. It is therefore apparent, and needs no argument to show, that the defendant's contention in the case in hand finds no support in the Lippincott and Merchant cases.

There is no merit whatever in the defendant's position that the verdict and judgment in the first case is a bar to the present action. The first action, like the present, was to recover damages for a continuing nuisance created by the operation of the defendant company's electric light plant on the adjoining lot. Damages

were recovered for the injury to the plaintiffs' buildings and for the loss of rent of the buildings up to the date of bringing the action. The present suit was brought by privies in title to the plaintiffs in the prior action, for injuries of the same character and occasioned by the same operation of the machinery in the defendant's electric plant subsequent to the date to which damages were recovered in the former action. As well said by the learned trial judge, in speaking of the measure of damages and the cause of action in the first suit:

"The measure of damages was not the permanent injury done to the real estate. It was not a question of depreciation in market value, but simply one of the value of the necessary repairs and the depreciation in rental value caused by the operation of the defendant's plant. How plaintiffs' property would be injured in the future could not have been foretold. What depreciation there might have been in rental value could not have been foreseen. There was no permanency to be calculated upon in the operations of the company. They could suspend their working. It could not be assumed that defendant would continue the unlawful infliction of injury upon the plaintiffs after the trial, notwithstanding defendant contended it was not responsible for any injury at all. In point of fact, therefore, the first suit was not for permanent injury, and therefore the position of the defendant indicated in the reserved point [that the judgment in the first suit was a bar to any further action] is untenable."

The injury done to the plaintiffs' property from time to time was a continuing nuisance, and hence no action would be a bar to a subsequent action except as to the damages sustained and recovered to the date of bringing the prior suit.

It is well settled that punitive or exemplary damages may be recovered in a second or subsequent suit for a continuance of a private nuisance. It is the duty of the defendant to abate the nuisance after the recovery of a judgment in the first action, and, if he fails to do so and continues it, it aggravates the injury and enlarges the damages which may be recovered in the second action. *McCoy v. Danley,* 20 Pa. 85, 57 Am. Dec. 680; *Ellis v. Academy of Music,* 120 Pa. 608, 15 Atl. 494, 6 Am. St. Rep. 739. In these and other decisions of this court it is held that a judgment in favor of the plaintiff in the first action fixes the liability of the defendant and is decisive of the parties' rights in the controversy.

The assignments of error are overruled, and the judgment is affirmed.

MARTIN v. CITIZENS' GENERAL ELECTRIC CO.

Kentucky Court of Appeals — April 13, 1906.

29 Ky. L. Rep. 103, 92 S. W. 547.

1. INJURY TO LINEMAN — LIABILITY OF TELEGRAPH COMPANY — WIRE CROSSED WITH ELECTRIC LIGHT WIRE. — A lineman, injured by shock from a telegraph wire which had become charged by crossing an electric light wire, cannot recover from the telegraph company, it having no knowledge that the wire was dangerous, and there being no circumstances to put it on notice of the danger.
2. SAME — CONTRIBUTORY NEGLIGENCE. — In action for injury by a lineman of an electric company received by coming in contact with the wires of another electric company and a telegraph company, it was *held* that the plaintiff was guilty of contributory negligence.

Appeal by plaintiff from a judgment for defendants. *Affirmed.*

B. H. Young and *M. W. Ripy,* for appellant.

O'Neal & O'Neal, for appellee Citizens' General Electric Co. and Louisville Electric Light Co.

Gibson, Marshall & Gibson, for appellee American District Telegraph Co.

Opinion by HOBSON, C. J.:

George R. Martin was a lineman in the service of the Citizens' General Electric Company. On September 20, 1902, he was directed to put a cross-arm on one of its poles on Fifth street between Jefferson and Market. Right by this pole stood a pole of the Louisville Electric Light Company. The two poles were very close together at the bottom, so close that Martin could not go up between them. He went up the pole of the Louisville Electric Light Company. Both poles carried wires charged with deadly currents of electricity. On the pole of the Citizens' General Electric Company, and above its wires, the American District Telegraph Company had strung a wire, which was used for telegraphing purposes and carried only a small amount of electricity, which was insufficient to hurt any one. After Martin got up the pole of the Louisville Electric Light Company, he stood upon its cross-arm with one foot on or near the wire of that company, and while standing in this way, in passing a rope, he threw his hand up and it came in contact with the wire of the telegraph company.

e think it reasonably clear that the jury found for the defendants upon the ground that Martin was himself negligent in standing upon the pole of the Louisville Electric Light Company, with is foot on the wire of that company, which he knew was charged ith 2,000 volts of electricity. He knew the dangers of the situaion. He could see the wires about him. He knew the danger f making a short circuit, and if he had not placed his foot on the ire of the electric company there would have been no danger n his throwing his hands about the other wires. He knew the anger of getting his hands on these wires when discharging his nties on the pole, and the jury evidently thought that he was egligent in standing on the arm of the Louisville Electric Light Company with his foot on its wire, when any movement of his and might bring it in contact with some of the other wires about im. The evidence presented a question of fact for the jury, and e cannot disturb their finding on this question of fact.

Judgment affirmed.

WILBERT v. F. ZURHEIDE BRICK CO. ET AL.

Wisconsin Supreme Court — April 17, 1906.

129 Wis. 1, 106 N. W. 1058.

1. DEATH FROM CONTACT WITH TREE WIRE — DEFECTIVE INSULATION — EVIDENCE. — In an action to recover for death caused by a shock received from a tree wire which had become charged owing to a defective insulator between a span wire and an electric light, *held* that the evidence was sufficient to justify the jury in finding that the defect in the insulator had existed for a sufficient time for the defendant, in the exercise of ordinary care, to have discovered and repaired it before the injury.
2. ELECTRIC LIGHT COMPANY — DEGREE OF WATCHFULNESS. — The danger incident to the use of electricity is imminent and lurking in character, and a high degree of watchfulness for the prevention of accidents is imposed on persons handling it. The watchfulness needed should take into account the acts of strangers and the public generally.
3. EXISTENCE OF TREE WIRE — EXTRAORDINARY CONDITION. — The existence of a tree wire was not such an extraordinary and unusual condition that it can be said, as a matter of law, that it was not reasonably to be apprehended in the conduct of the business of an electric light company.

Appeal by defendant, the Sheboygan Light, Power & Railway Company, from a judgment for plaintiff. *Affirmed.*

"These may be said to be familiar facts in physics and therefore within the common knowledge of mankind and within the judicial knowledge of courts; that atmospheric electricity or lightning is frequently discharged from the clouds and passes to the earth; that metal wires strung in the air are good conductors of electricity, much better than the air; that electricity so discharged in the vicinity of such wires is liable and apt to pass into them and along them to their ends and then through the best conductors at hand into the earth. It may also be said to be common knowledge that when two wires are strung near to each other within a foot or two on poles through the air after the mannor of telephone and telegraph wires, there is a likelihood or liability that lightning in its descent from the clouds will strike and follow both of them to their ends unless diverted by other more attractive conductors and must necessarily then pass from them to the earth through the best conductor then in its general pathway." *Jackson v. Wis. Tel. Co.*, 5 Am. Electl. Cas. 335, 88 Wis. 243, 60 N. W. 430, 26 L. R. A. 101.

But it is contended that even if the plaintiff's theory on this branch of the case is correct, that fact is wholly insufficient to establish any liability on the part of the defendant. It is still insisted that there was no negligence or other fault on the part of the defendant which can legally be deemed the proximate cause of the fire.

It is alleged in the plaintiff's declaration that the defendant "carelessly, negligently and defectively constructed and maintained its said telephone line in this particular. A telephone pole was placed in the ground within a few feet of the corner of the plaintiff's barn and the pole with the main wire thereon fastened or stayed to said barn by running a common telephone wire from the top of said pole to said barn without insulation or the insertion of lightning arresters or anything whatever to prevent the passage of electricity and lightning from said pole to said barn."

It is suggested in the plaintiff's argument, that the defendant invaded the plaintiff's premises, and attached the guy wire to her barn without consent of her predecessor in title, who was the owner at that time, and without consent of the plaintiff since that time. See Rev. St., c. 55, § 23. It is therefore contended that the defendant is liable for all damages resulting from such unauthorized acts irrespective of the question of negligence. *Derry v. Flitner*, 118 Mass. 133.

It is not in controversy, however, that when the line was originally constructed past the plaintiff's premises by the Dirigo Telephone Company, the defendant's predecessor, no pole was erected

at the corner of the barn, but the main wire was directly connected with the barn by means of an insulated oaken bracket spiked to the corner post, and that this was done by the express consent of Mr. White, the owner of the premises at that time. But when the line was reconstructed by the defendant company the pole was erected near the barn, and the guy wire attached to the corner of it as heretofore explained, and Mr. White, who still owned the property, says he told the man who was working on the wire that he "thought it wasn't right." It appears, however, that the connection of the wire with the barn as made was acquiesced in by Mr. White, without further question, for nearly four years thereafter, and it is not suggested that any objection has ever been made by this plaintiff during the year of her ownership before the fire.

It also appears that the defendant constructed its line past the plaintiff's premises without first obtaining a written permit from the selectmen of the town as required by section 17 of chapter 55 of the Revised Statutes. But this fact obviously did not contribute as one of the real and proximate causes of the plaintiff's loss. *Cumberland Co. v. Tow Boat Co.*, 90 Me. 95, 37 Atl. 867, 60 Am. St. Rep. 246. It could not have influenced any of the laws of electricity or meteorology involved in the decision of the case.

In view of these considerations and the fact that in the declaration the plaintiff claims to recover on the ground of negligence, and not upon the assertion of an absolute liability of the defendant for the consequences of a tortious act, the trial of the case proceeded upon the former theory, and two questions were properly submitted to the jury, first, the question already fully considered, whether the fire was caused by electricity passing along and over the telephone wires and the guy wire to the barn, and secondly, whether there was any negligence in the manner of constructing and maintaining its line at the point in question, and especially in connecting the guy wire to the barn without the attachment of lightning arresters or other appliances calculated to prevent a current of electricity of such intensity as to cause fire from entering the barn by means of such wire.

It was incumbent upon the plaintiff then to show in the second place, that in connecting and maintaining a guy wire between the

telephone pole and the plaintiff's barn without lightning arresters or circuit breakers, the defendant company did not use that degree of care, prudence, and foresight demanded by the exigencies of the situation. The company was not obliged by law to guaranty the safety of its system under all possible conditions and circumstances, but it was required to exercise that due and ordinary care which the present state of scientific knowledge, as well as common observation of the nature of electricity and the enormous power of lightning would suggest as reasonably necessary for the protection of life and property along its line.

The plaintiff claims that there was a manifest failure of duty in this respect on the part of the defendant, while the defendant as strenuously insists that the construction was in all respects suitable and adequate, and that the loss was not occasioned by any fault of the company.

Upon this question the testimony of the experts is as sharply conflicting as upon the first proposition. Mr. Whitney and Mr. Berry, the two electricians who testify for the plaintiff upon this branch of the case, give emphatic expression to the opinion that it is not a safe or proper construction to connect a telephone line to a building by means of a guy wire, as was done in this case; that such a method is not to be approved at all, but if adopted, it would not be reasonably safe or suitable construction unless provided with lightning arresters, circuit breakers or "strained insulators."

On the other hand, Mather and Fickett are equally positive in their statements that the method followed by the defendant is a safe and proper construction and the one generally adopted throughout the country for the low tension wires required in telephone business; that the insulators referred to by plaintiff's witnesses, or a lightning arrester attached to the guy wire, would be wholly ineffectual and useless against the tremendous force of a lightning current. Mather further states that he had found by experiment that it was necessary to insert twelve of "these insulators" one after the other in a long chain in order to insulate from each other two ends of a wire that was charged with an electrical pressure of 10,000 volts.

Some of the testimony, however, would seem to rest upon a misapprehension of the exact nature and purpose of a lightning

arrester. It is fairly to be inferred from all the evidence that it is a device which might more appropriately be termed a "lightning diverter," since the office of it is not to arrest the lightning, but to divert it from the wiring by offering a comparatively easy course to the earth. In this alternative path a short air space is left between two plates introduced directly between the line and the earth. This air space is an effectual insulator for the normal current over the telephone wire, but the violent surges of a lightning current are said to leap over the air gap and pass to the ground.

It is not in controversy, it is true, that the electrical explosion in question on the morning of August 22, 1903, was one of extraordinary though not of unprecedented violence; and it was the obvious duty of the defendant company to adopt methods of construction with reasonable regard to the protection of life and property against the ravages of lightning, and to anticipate, as far as practicable by the exercise of due care and prudence, not only the probable effects of ordinary lightning discharges, but of such extraordinary thunderstorms as according to the common observation of men, are known to occur not necessarily once every year, but once in several years, and at no regular intervals. *Woodward v. Aborn,* 35 Me. 271, 58 Am. Dec. 699; *Smith v. Faxon,* 156 Mass. 598, 31 N. E. 687.

Thus if the plaintiff's theory is correct that it was not safe or suitable construction to connect the guy wire with the barn without a lightning arrester or circuit breaker, the evidence warranted a finding by the jury that the defendant company did not exercise reasonable and ordinary care in establishing its line at the point in question.

Again, if the defendant's theory is correct that it is utterly impracticable to divert lightning currents from such a wire to the earth by means of any insulators or circuit breakers hitherto devised, it cannot be said to be manifest error on the part of the jury to find such a wire should not have been attached to the barn at all, and that in making such a connection, the defendant, if possessed of scientific knowledge to sustain its theory, did not act with proper regard for the rights of the plaintiff and the safety of her property.

The conclusion accordingly is that the entry must be:

Motion and exceptions overruled.

SIMMONS v. SHREVEPORT GAS, ELECTRIC LIGHT & POWER CO.

Louisiana Supreme Court — April 9, 1906.

116 La. 1033, 41 So. 248.

MAINTENANCE OF WIRES BY TELEPHONE AND ELECTRIC LIGHT COMPANY — NEGLIGENCE. — Due care requires of those using wires or conductors of electricity so to place and maintain them with reference to similar conducting agencies that dangerous contact be not probable; and where wires maintained concurrently by different parties are so erected or strung that they are likely to touch, possibly with destructive consequences, either or both parties must make efforts to remedy such dangerous condition, and if an injury occurs through the neglect of such duty, both are liable.

(Syllabus by the Court.)

Appeal by defendants from judgments for plaintiffs. *Affirmed.*

Alexander & Wilkinson, for appellant Shreveport Gas, Electric Light & Power Co.

Wise, Randolph & Rendall, for appellant Shreveport Telephone Co.

Hall & Jack, for appellees.

Opinion by PROVOSTY, J.:

The wires of the two defendant companies are on the same side of the street. The telephone company's posts are taller than those of the electric light company, and its wires are strung ten feet higher. For connecting with a house on the other side of the street two of the telephone wires were run slanting downward to a lower post on the same side of the street a distance of about eighty feet, then across the street to the house, then down the side of the house, and finally under the house, two feet from the ground. On their way downward they passed through the fleet of wires of the electric light company. This brought one of them so close to one of the heavily charged wires that the two would touch in oscillating; and the result was that the insulation of the heavily charged wire was either worn off or burnt off, and that the otherwise harmless wire going to the house became itself dangerously charged. This situation had lasted more than nine months, and the telephone had been removed from the house for more than three months, when the accident occurred which has given rise to this suit.

The two little sons of the plaintiffs in these suits while at play near the house came in contact with the wire. Both were knocked senseless, and remained unconscious some time. Young Simmons soon revived. His only other injury was a burn in the hand which necessitated his carrying the member in a sling for two months, and which has left no trace except a large scar across the palm and a slight contraction of the web between the thumb and the forefinger, such as will affect the use of the hand but very little. Young Smullins remained unconscious for four hours. The little finger of his right hand was burnt off entirely; the next finger was so burnt as to have to be amputated just below the first joint; it, or what is left of it, and the middle finger are now bent rigidly inward, useless and deformed, crooking sideways; the end of one a stub, and the end of the other shrunk, and dwarfed, and peaked. In addition to this, his scalp was burned a space some five or six inches in diameter, and through the skin, and through the outer layer of bone, which afterwards sloughed off. Two months after the accident an operation became necessary, and a circle of four or five inches of the dead bone was cut off. At the time of the trial, which was six months after the accident, the physicians thought the wound would heal in about seven or eight weeks; but that grafting might become necessary, and that the place would remain permanently bald.

The defendants are sought to be held responsible *in solido*. The telephone company admits its negligence, and its liability for whatever amount of damages the nature of the case may warrant. It complains however, of the award of the jury as excessive. That award is $500 in the Simmons Case, and $8,150 in the Smullins Case. If the verdict had been somewhat less the court would, perhaps, have liked it better; but it is not so manifestly excessive as to require reduction.

The negligence charged against the electric light company is that it tolerated this faulty and dangerous construction, and thereafter failed to keep its own wires sufficiently insulated to prevent the transmission of the current.

On the side of the company it is argued that it does not suffice for a plaintiff to make his case probable, that he must make it certain, and that the plaintiffs in this case have failed in making their case certain, because, for all that appears, the insulation on

the electric light wire may have been burnt off so recently that the company had not had time to discover the defect; and that this view of the case is rendered all the more probable from the fact that the company's system of construction was of the best and its mode of insulation of the most approved kind; and that the preceding day had been a wet day, when the burning of the insulation might have taken place.

It is further argued that conceding negligence on the part of the electric light company, such negligence was not the proximate cause of the injury; but that the proximate cause was the subsequent intervening and independent act of the telephone company, first, in leaving the wires in position after the removal of the phone, when they had ceased to be of any utility; and, secondly, in not properly insulating them. It is urged that the city ordinances required the telephone wires to be insulated, and that the electric light company had the right to assume that the telephone company would do its duty.

In answer to this argument we will say that, as a matter of fact, it is not true that the situation would have been without danger if the telephone wires had been properly insulated and the phone not removed; the evidence shows the contrary. The construction was originally and in itself so manifestly dangerous that the president of the electric light company says he would have protested against it if he had known of it. Such being the case it can make no difference whether the insulation had worn off or burnt off. Indeed, if the defendant's electrician is to be believed that in wet weather the insulation becomes soft and lets the current through and burns off even on slight contact with another wire, the construction was all the more dangerous, for in that case insulation would have been no protection. But, as a matter of fact, the insulation, whether by rubbing or burning, had been off for some time when the accident happened; the wires were worn bright where they touched, which shows that they must have been rubbing against each other for some time; long enough, surely, for the company to have had ample time in which to have discovered the defect, by proper inspection, and corrected it.

But we prefer to rest the case on the incontestible ground of the failure of the electric light company to have known of and remedied, this defective construction which had been a standing

menace for more than nine months. The law on the subject is well stated in the following excerpt from 15 Cyc. 474, founded in part on the decision of this court in the case of *Hebert v. Lake Charles Ice Co.*, 111 La. 522, 35 So. 731, 64 L. R. A. 101, 100 Am. St. Rep. 505, to wit:

"Due care requires of those using wires or conductors of electricity so to place and maintain them with reference to similar conducting agencies that dangerous contact is not probable; and, where wires maintained concurrently by different parties are so erected or strung that one is likely to fall upon or come in contact with the other, thereby producing possible destructive consequences, either or both of them must make efforts to abate such dangerous condition, and if an injury occurs through a neglect of such duty, both are liable."

The legal situation of electric light and power companies sending this potent fluid along their wires may be illustrated by comparing it to that of a showman conveying a caged tiger through the streets of a crowded city. The showman must not only make sure of the cage, and not himself open the door, but be vigilant in seeing that nobody else opens the door. He could hardly expect that he would be heard to plead that some negligent person had opened the door. Of course, the situation is incomparably more complicated in the case of an electric light or power company with its system of wires pervading an entire city, and the appreciation of the facts in particular cases may be proportionally more difficult; but the principle is the same. Indeed, the prisoner of the company is more sleepless and subtle and in its stroke more quick and sure, whence the need of even greater viligance in keeping it safe within its prison wire.

Under this view of the matter the negligence of the electric light company continued down to the moment of the accident, and hence was its proximate cause.

We have not looked into the complaints against the charge of the judge. They would be no ground for remanding the case even if well founded. Where all the evidence is in the record this court must proceed to pass on the case finally. Hennen, p. 92, No. 5.

Judgment affirmed.

BREAUX, C. J.: I concur in the opinion and decree, and dissent only regarding the amount. I think it is excessive.

GANSTER ET AL. v. METROPOLITAN ELECTRIC CO.

Pennsylvania Supreme Court — April 9, 1906.

214 Pa. 628, 64 Atl. 91.

1. ELECTRIC LIGHT COMPANY — OPERATION OF PLANT — NUISANCE. — An electric light company, a corporation, which so operates its plant as to cause the walls of an adjoining building to shake and crack, and, in time, if the nuisance is persisted in will result in the destruction of the building, is liable in damages.
2. SAME — EMINENT DOMAIN. — A corporation can only injure or destroy property where it possesses the power of eminent domain and exercises that power in the manner provided by statute.

Appeal by defendant from judgment for plaintiffs. *Affirmed.*

Before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, and POTTER, JJ.

Richmond L. Jones, for appellant.

Jefferson Snyder, Cyrus G. Derr, and *Edward S. Kremp,* for appellees.

Opinion by MESTREZAT, J.:

The learned trial judge correctly decided the controverted questions in this case, and the reasons given and the authorities cited in his opinion in discharging the rule for judgment *non obstante veredicto* fully justify his conclusion. This is an action of trespass to recover damages for injuries to the buildings on the plaintiffs' lot caused by the operation of the machinery in the defendant's electric light plant on the adjoining lot. The plaintiffs' allegation here, sustained by the judgment in a former action, is that the defendant company " so attached their works and build-

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Nuisance. — Power house of a railway and light company may constitute a nuisance. *Townsend v. Norfolk Ry. & Light Co., post,* 105 Va. 22, 52 S. E. 910. The connecting of a rail in front of a bank building with an electric battery constitutes a nuisance *per se. Whaley v. Citizens' Nat. Bank, ante,* 25 Pa. Super. Ct. 531. But the transmission of electricity at a high voltage for lawful purposes does not constitute a nuisance *per se. Mull v. Indianapolis & C. Traction Co., post,* 169 Ind. 214, 81 N. E. 657.

The stringing of a live electric wire, contact with which will kill or severely injure, so near a thoroughfare where many people pass that contact with it is possible, constitutes a nuisance. *Wittleder v. Electric Illuminating Co.,* 7 Am. Electl. Cas. 581, 587, note.

ings to ours that in operating its works it grievously injured our buildings and rendered them untenantable." It is claimed, and the evidence tended to show, that the defendant's building was so constructed that the vibration produced by the operation of the ponderous machinery therein "shook the buildings of the plaintiffs, that the shaking was not of the ordinary character, but was of such a nature as to cause the plaster to fall off from the walls, pictures to fall from the walls, windows to rattle, panes to fall out, some cracks in walls, and crockery to fall from shelves or cupboards." In other words, it is alleged, and a judgment of the court below has determined, that the continuous operation of the defendant's light plant will in time result in the destruction of the buildings on the plaintiffs' adjoining lot.

In the absence of authority conferred by its charter, a corporation will not be relieved from liability for special injury to private property resulting from the exercise of its corporate powers. In this respect a corporation occupies the same position and is responsible for its injurious acts to the same extent, that a natural person is. *Rogers v. Philadelphia Traction Company,* 182 Pa. 473, 38 Atl. 399, 61 Am. St. Rep. 716. In that case, Chief Justice STERRETT, in delivering the opinion, says (page 477 of 182 Pa., page 401 of 38 Atl. [61 Am. St. Rep. 716]):

"There is certainly nothing in its [traction company's] charter to relieve the defendant from liability for the special injury which the plaintiff has suffered in consequence of its operations on its own land, as determined by the verdict. As an artificial person it cannot, any more than a natural person, escape liability for special injury done to others, unless it can be shown that, because it is a mere creature of the law, it enjoys immunity from liability which natural persons do not; but no such proposition as that has ever been recognized in any well-considered case. No authority for it can be found in *Pennsylvania Railroad Co. v. Lippincott,* 116 Pa. 472, 9 Atl. 871, 2 Am. St. Rep. 618; *Pennsylvania Railroad Co. v. Marchant,* 119 Pa. 541, 13 Atl. 690, 4 Am. St. Rep. 659, or any of that line of cases. It is not only untenable in law, but it is lacking in reason. If several individuals had purchased the defendant company's lot and erected thereon the machinery and appliances that it did, and had operated the same as it has done to the great and manifest special injury of the plaintiff, no one would venture to question their liability to respond in damages."

The defendant corporation was clearly liable for the nuisance committed against the plaintiffs in the operation of its plant. The learned counsel for the defendant company bases its right to immunity for the commission of the nuisance on the ground that

his company has the right of eminent domain. He relies on the recent case of *Brown v. Radnor Townshi Light Company,* 9 Am. Electl. Cas. 305, 208 Pa. 453, 57 as establishing the doctrine that electric light companies under the act of May 8, 1889 (P. L. 136) possess the eminent domain. He clearly misapprehends the rulin case and misapplies the doctrine there announced to th the case in hand. There, the owner of the land throu a turnpike road passes filed a bill to enjoin the electric pany from erecting its poles and stringing its wires in the side of the road through his land. The court belo the injunction, and its decree was affirmed by this court held that, as by the express terms of the act of 1889 company had "the right to enter upon any public st alley or highway" for the purposes of its incorporati authorized to erect its poles and string its wires in the turnpike road through the plaintiff's land, and to that had the right of eminent domain. The right of an ele company to condemn land for its power house, or to ex power of eminent domain generally, did not arise an determined by the decision in the case. The right to poles on a public road or highway was held to be con such companies only by reason of the express language authorizing their incorporation. It was said in the quoting from *Pennsylvania Railroad Company v. Canal sioners,* 21 Pa. 9, that "corporate powers can never be implication nor extended by construction." No part expressly invests electric light companies with the pow demn lands other than those in roads or highways in company is permitted to erect its poles. It is clear, that the case cited by the defendant's counsel does not s position that his company possesses the unlimited right o domain.

But, if it be conceded that the defendant company i with the full power of eminent domain, it was not ju committing the injurious acts complained of in this acti authority would not legalize a nuisance of this characte Am. & Eng. Enc. of Law (2d ed.) 737, it is said; num thorities being cited to support the proposition:

"If the annoyance or damage arising from such nuisance is such as to destroy or substantially impair the legitimate use and enjoyment of private property, and so amount to a taking, the person injured is entitled to redress, notwithstanding the legislative authorization."

The acts complained of here, it will be observed, are not mere trifling annoyances or discomforts created by smoke or noise or dust resulting from the operation of the plant, but were real and substantial injuries to the plaintiffs' building, causing its walls to shake and crack, and, in time, if the nuisance is persisted in, necessarily resulting in the destruction of the building. No person's property can in this State be taken, injured, or destroyed without compensation, and a corporation can only injure or destroy property when it possesses the power conferred by the State and exercises that power in the manner provided in the statute. Until the defendant company, therefore, has exercised its alleged right of eminent domain and by the authority thereof acquires plaintiffs' property, its illegal acts resulting in a substantial impairment and, finally, in the destruction of the property, constitutes an actionable nuisance for which it is liable in this action. This case is not ruled by *Pennsylvania Railroad Company v. Lippincott,* 116 Pa. 472, 9 Atl. 871, 2 Am. St. Rep. 618, and *Pennsylvania Railroad v. Marchant,* 119 Pa. 541, 13 Atl. 690, 4 Am. St. Rep. 659, relied on by the defendant's counsel to support his position. In that case the injuries were caused by the noise, smoke, and dust from the defendant company's engines and cars used in operating its railroad on a viaduct on its own land on the opposite side of a street from the plaintiffs' premises. Here the defendant company erected its plant on land purchased for the purpose and in immediate contact with the plaintiffs' buildings, and so constructed the foundation and floor of its building that the operation of the heavy machinery resulted directly in destroying the use of the plaintiffs' buildings. It is therefore apparent, and needs no argument to show, that the defendant's contention in the case in hand finds no support in the Lippincott and Merchant cases.

There is no merit whatever in the defendant's position that the verdict and judgment in the first case is a bar to the present action. The first action, like the present, was to recover damages for a continuing nuisance created by the operation of the defendant company's electric light plant on the adjoining lot. Damages

were recovered for the injury to the plaintiffs' buildings and the loss of rent of the buildings up to the date of bringing action. The present suit was brought by privies in title to plaintiffs in the prior action, for injuries of the same chara and occasioned by the same operation of the machinery in the fendant's electric plant subsequent to the date to which dam were recovered in the former action. As well said by the lear trial judge, in speaking of the measure of damages and the ca of action in the first suit:

"The measure of damages was not the permanent injury done to the estate. It was not a question of depreciation in market value, but simply of the value of the necessary repairs and the depreciation in rental value ca by the operation of the defendant's plant. How plaintiffs' property woul injured in the future could not have been foretold. What depreciation might have been in rental value could not have been foreseen. There wa permanency to be calculated upon in the operations of the company. They suspend their working. It could not be assumed that defendant would tinue the unlawful infliction of injury upon the plaintiffs after the notwithstanding defendant contended it was not responsible for any inju all. In point of fact, therefore, the first suit was not for permanent in and therefore the position of the defendant indicated in the reserved [that the judgment in the first suit was a bar to any further action] i tenable."

The injury done to the plaintiffs' property from time to was a continuing nuisance, and hence no action would be a to a subsequent action except as to the damages sustained recovered to the date of bringing the prior suit.

It is well settled that punitive or exemplary damages may recovered in a second or subsequent suit for a continuance private nuisance. It is the duty of the defendant to abate nuisance after the recovery of a judgment in the first action, if he fails to do so and continues it, it aggravates the injury enlarges the damages which may be recovered in the second act *McCoy v. Danley,* 20 Pa. 85, 57 Am. Dec. 680; *Ellis v. Acade of Music,* 120 Pa. 608, 15 Atl. 494, 6 Am. St. Rep. 739. these and other decisions of this court it is held that a judgm in favor of the plaintiff in the first action fixes the liability the defendant and is decisive of the parties' rights in the troversy.

The assignments of error are overruled, and the judgmen affirmed.

MARTIN v. CITIZENS' GENERAL ELECTRIC CO.

Kentucky Court of Appeals — April 13, 1906.

29 Ky. L. Rep. 103, 92 S. W. 547.

1. INJURY TO LINEMAN — LIABILITY OF TELEGRAPH COMPANY — WIRE CROSSED WITH ELECTRIC LIGHT WIRE. — A lineman, injured by shock from a telegraph wire which had become charged by crossing an electric light wire, cannot recover from the telegraph company, it having no knowledge that the wire was dangerous, and there being no circumstances to put it on notice of the danger.
2. SAME — CONTRIBUTORY NEGLIGENCE. — In action for injury by a lineman of an electric company received by coming in contact with the wires of another electric company and a telegraph company, it was *held* that the plaintiff was guilty of contributory negligence.

Appeal by plaintiff from a judgment for defendants. *Affirmed.*

B. H. Young and *M. W. Ripy,* for appellant.

O'Neal & O'Neal, for appellee Citizens' General Electric Co. and Louisville Electric Light Co.

Gibson, Marshall & Gibson, for appellee American District Telegraph Co.

Opinion by HOBSON, C. J.:

George R. Martin was a lineman in the service of the Citizens' General Electric Company. On September 20, 1902, he was directed to put a cross-arm on one of its poles on Fifth street between Jefferson and Market. Right by this pole stood a pole of the Louisville Electric Light Company. The two poles were very close together at the bottom, so close that Martin could not go up between them. He went up the pole of the Louisville Electric Light Company. Both poles carried wires charged with deadly currents of electricity. On the pole of the Citizens' General Electric Company, and above its wires, the American District Telegraph Company had strung a wire, which was used for telegraphing purposes and carried only a small amount of electricity, which was insufficient to hurt any one. After Martin got up the pole of the Louisville Electric Light Company, he stood upon its cross-arm with one foot on or near the wire of that company, and while standing in this way, in passing a rope, he threw his hand up and it came in contact with the wire of the telegraph company.

Immediately he received a severe shock of electricity. His hand and foot were terribly burned, and he fell to the ground, suffering thus further injuries. He brought this action against all three of the companies. At the conclusion of the evidence the court instructed the jury peremptorily to find for the telegraph company, and the case being submitted to the jury as to the two electric light companies, they found a verdict for the defendants, and Martin appeals.

The proof was undisputed that the wire of the telegraph company was charged with only a few volts of electricity and that it was in itself entirely harmless. It is said that perhaps this wire had been crossed somewhere with some other wire, and had thus become charged with a deadly current of electricity. But this is pure speculation, and there is nothing in the record to show that the telegraph company knew, or had any reason to suppose, that there was any danger in its wire. Its wire being harmless in itself, the telegraph company would not be responsible to a stranger if he was hurt by touching it when the wire had become charged with electricity without its knowledge, or anything in the circumstances to put it on notice of the danger. The only reasonable inference from the proof is that Martin's foot was on the heavily charged wire of the Louisville Electric Light Company, and when he touched the other wire he completed the circuit. The electricity that burned his foot and his hand came from the heavily charged wire of the Louisville Electric Light Company. The only reason that he was not killed was that the insulation in part protected him from the deadly current of electricity which the wire carried. We therefore conclude that the peremptory instruction in favor of the telegraph company was correct.

It is also insisted that the instructions of the court to the jury were erroneous. In the recent case of *Mangan v Louisville Electric Light Company,* 9 Am. Electl. Cas. 692, 91 S. W. 703, 28 Ky. L. Rep. —, the previous cases were reviewed, and the proper instruction to be given in cases of this sort was determined. The instructions which the court gave in the case before us were more favorable to Martin than the rule laid down in that case warrants. In fact, we fail to see any very substantial difference between the instructions the court gave on the trial and those which he asked himself. On the whole record,

we think it reasonably clear that the jury found for the defendants upon the ground that Martin was himself negligent in standing upon the pole of the Louisville Electric Light Company, with his foot on the wire of that company, which he knew was charged with 2,000 volts of electricity. He knew the dangers of the situation. He could see the wires about him. He knew the danger of making a short circuit, and if he had not placed his foot on the wire of the electric company there would have been no danger in his throwing his hands about the other wires. He knew the danger of getting his hands on these wires when discharging his duties on the pole, and the jury evidently thought that he was negligent in standing on the arm of the Louisville Electric Light Company with his foot on its wire, when any movement of his hand might bring it in contact with some of the other wires about him. The evidence presented a question of fact for the jury, and we cannot disturb their finding on this question of fact.

Judgment affirmed.

WILBERT v. F. ZURHEIDE BRICK CO. ET AL.

Wisconsin Supreme Court — April 17, 1906.

129 Wis. 1, 106 N. W. 1058.

1. DEATH FROM CONTACT WITH TREE WIRE — DEFECTIVE INSULATION — EVIDENCE. — In an action to recover for death caused by a shock received from a tree wire which had become charged owing to a defective insulator between a span wire and an electric light, *held* that the evidence was sufficient to justify the jury in finding that the defect in the insulator had existed for a sufficient time for the defendant, in the exercise of ordinary care, to have discovered and repaired it before the injury.
2. ELECTRIC LIGHT COMPANY — DEGREE OF WATCHFULNESS. — The danger incident to the use of electricity is imminent and lurking in character, and a high degree of watchfulness for the prevention of accidents is imposed on persons handling it. The watchfulness needed should take into account the acts of strangers and the public generally.
3. EXISTENCE OF TREE WIRE — EXTRAORDINARY CONDITION. — The existence of a tree wire was not such an extraordinary and unusual condition that it can be said, as a matter of law, that it was not reasonably to be apprehended in the conduct of the business of an electric light company.

Appeal by defendant, the Sheboygan Light, Power & Railway Company, from a judgment for plaintiff. *Affirmed.*

Statement of facts by SIEBECKER, J.:

The appellant, the Sheboygan Light, Power & Railway Company, is a c poration conducting its business in the city of Sheboygan, under autho granted it by the city. It maintains the poles, wires, lamps, and stat necessary for an electric lighting business. In June, 1902, it maintaine street light at the intersection of North Thirteenth street and Erie ave In maintaining this light it had placed one electric light pole at the no east corner, and another at the southwest corner, of the intersection of th streets. To the tops of the poles was attached the span wire from which the st lamp was suspended. A guy wire was attached to the pole at the southw corner of this street crossing and was also fastened, about four feet from ground, to a guy post, placed to the west, between the sidewalk and gutter. A thin wire had been stretched from this guy post, about four f from the ground, to a tree, at about nine feet from the ground. tree was located to the east and near the light pole at the southw corner of the street crossing. This wire had been placed there by Mr. Zurheide, who resided on the adjoining premises, for the pur of holding the tree upright and to prevent its branches from dropping on railway gate near the tree. This wire was fastened to the tree by a st and was wound around the guy post in contact with the guy wire. The st lamp, which was suspended by an interlocking device from the span wire n the centre of the street crossing, had a rope attached to it which led to light post and was used to raise and lower the lamp. When the lamp completely raised, the only break in the metallic connection from the lam the span wire was an insulator of the usual type. This was placed there prevent the electric current, which fed the lamp, from passing from the la to the locking device, and thence to the span wire and the other connecti forming a conductor for the electric current. The complainant alleges t the Sheboygan Light, Power & Railway Company negligently constructed maintained its plant at this street crossing; in that it placed the guy p with the guy wire attached too near the ground and in contact with the s wire near the top of the light pole, and that it negligently used a defect insulator between the lamp and the span wire, and failed to exercise due c to discover the tree wire, the broken insulator, and the consequent escape the electric current. It is further alleged that, by reason of such neglect, the night of June 6, 1902, one Hugo Wilbert, without fault on his part, wh lawfully traveling on the street crossing, came in contact with this tree wi charged with the electric light current, which had passed through the def tive insulator and thence to the locking device and the connecting wir causing his immediate death. This action is brought to recover the damag resulting from his death.

At the conclusion of plaintiff's evidence, the defendant, the Sheboyg Light, Power & Railway Company, moved for a nonsuit and also for a dir tion of a verdict in its favor. Both of the motions were denied. The c was then submitted to the jury upon a special verdict, and they found effect: (1) That Wilbert was killed by an electric current by coming contact with the tree wire; (2) that the insulator above the lamp was crack and defective, permitting the electric current to pass from the lamp throu the locking device to the span wire; (4) that the span and guy wires w in close proximity at the top of the light pole; (5) that the electric curr

passed from the lamp through the defective insulation, then through the locking device and the span, guy and tree wires, and thence through Wilbert's body to the ground; (6) that this condition of the lamp, wires, and post, and the escaping electricity, made the street insufficient and dangerous at this place; (7) that the defendant, in the exercise of ordinary care, ought to have discovered these defective and dangerous conditions and to have remedied them before Wilbert was killed; (8) that these defects were the proximate cause of his death; (9) that he was free from contributory negligence in coming to his death. After verdict, appellant moved for judgment notwithstanding the verdict, and, in case of such motion being denied, it moved to change the answers to questions 7 and 8 of the verdict, by striking out the answer "Yes" to each of them, and by inserting the answer "No," and by striking out the answers to questions 9 and 10. These motions were denied, and judgment was awarded plaintiff upon the verdict as rendered by the jury. This is an appeal from such judgment.

Francis Williams (*W. M. Wherry, Jr.,* and *William Osgood Morgan,* of counsel), for appellant.

Simon Gillen and *E. R. Veech,* for respondent.

Opinion by SIEBECKER, J.:

Appellant contends that the evidence is insufficient to support the inference that the negligence complained of was the proximate cause of the injury. The plaintiff's claim respecting the defective and dangerous condition, construction, and maintenance of the light plant is not controverted, but it is asserted that the defendant had no knowledge that the tree wire had been attached to the guy wire and post, or that lamp insulator by cracking had become defective and unsafe, thus permitting the electric current to escape from the lamp to the span and guy wires and thence to the tree wire. The jury found that these conditions of the plant made the street at the place of accident dangerous to persons using it for the ordinary purposes of travel, and that these dangerous conditions had existed a sufficient length of time before the accident for the defendant, in the exercise of ordinary care and diligence, to have discovered and remedied them. It is not questioned but that these defects and the dangerous condition of the street existed at the time of the accident, as claimed; but it is urged that the proof is insufficient to show that the insulator near the lamp had been out of repair for a sufficient length of time to charge the defendant with negligence in not having discovered it before the accident occurred. There is evidence tending to show that a few hours after the accident tests were made by defendant

to ascertain whether the guy wire was charged with an electı current, and that it became so charged when, by raising the lar to its full height, the locking device of the lamp attached to t span wire interlocked, indicating that the electric current cha ing the span, guy, and tree wires came from the lamp throu the defective insulator immediately above it. There is evider to the effect that, in the evening before the accident, elect sparks were observed among the tree branches, near the span a guy wires, and at points some distance from the pole, along t wires leading to this pole which supported the span and guy wi Several witnesses testified that they had observed the branches trees near to and in contact with these wires, and had seen pa of branches lying on the ground below; the ends being burı and charred and some of them having depressions burned i them, indicating contact with heat. It also appears that voltage of the current was of such high potential that, if it pas to these wires, it would heat them. The time during which t burning was testified to have occurred covered a period of seve weeks. The evidence tends to show that there was nothing the appearance of things to indicate that the defective condit of the insulator may not have existed for a considerable ti before the accident. There was no conflict in the proof as to sparks of electricity among the wires at the pole and the burn of the twigs and branches. In view of the nature of the busin and the circumstances of the case, we are of the opinion that jury were justified in their inference that the defect in the insu tion had existed for a sufficient time for the appellant, in exercise of ordinary care in the conduct of the business, to h discovered and repaired it before the injury happened.

It is also contended that there is no basis for the jury's find that defendant, in the exercise of reasonable care, ought to h discovered the dangers which caused Wilbert's death, and to h removed them before the accident, upon the ground that the istence of the tree wire was an intervention not within reas able apprehension in the ordinary course of events. If the ex ence of the tree wire was not within the field of reasonable app hension, then appellant's contention is well founded, for it can be charged with negligence respecting the existence of a condit not reasonably to be anticipated in the course of events. T

question, therefore, is whether, under the facts and circumstances proven, the existence of this tree wire was an intervention such as appellant should reasonably have apprehended as likely to exist. To say that a condition is reasonably to be apprehended does not imply that the exact condition proven as to the erection of this tree wire was to have been expressly contemplated, but it implies that a dangerous condition, in the nature of this one, was likely to arise in connection with the conduct of appellant's business. The danger incident to the use of electricity is imminent and lurking in character, and a high degree of watchfulness for the prevention of accidents is imposed on persons handling it. This court, referring to the care required of those handling electricity and the lurking danger to one coming in contact with live wires, stated, in *Nagle v. Hake,* 9 Am. Electl. Cas. 281, 123 Wis. 256, 101 N. W. 409: "From the very fact of these known dangers * * * [a person] must necessarily be charged with a higher degree of caution and diligence than one who is dealing with sticks and stones which cannot convey such a concealed death stroke." *Fitzgerald v. Edison Electric Co.,* 8 Am. Electl. Cas. 584, 9 Am. Electl. Cas. —, 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732; *Mitchell v. Raleigh Electric Co.,* 7 Am. Electl. Cas. 644, 129 N. C. 166, 39 S. E. 801, 55 L. R. A. 398, 85 Am. St. Rep. 735. The watchfulness needed to prevent such accidents should take into account the acts of strangers and the public generally. As above stated, we are of the opinion that the evidence warrants the inference drawn by the jury that, if appellant had exercised reasonable care and diligence, it would have discovered the defective insulator, and that the electric current was escaping to the connecting guy and span wires, and in the performance of this duty it would in all reasonable probability have observed the existence of this tree wire and the dangers incident to it. From this it must follow that the existence of this tree wire was not such an extraordinary and unusual condition that it can be said that, as a matter of law, it was not reasonably to be apprehended in the conduct of appellant's business. Under the circumstances, the court properly held that the evidence supported the finding that the defendant, in the exercise of ordinary care, ought to have discovered the defects and dangers complained of, and to have removed them before Wilbert's

death. The following adjudications have a bearing on the subject: *Kellogg v. C. & N. W. Ry. Co.,* 26 Wis. 223, 7 Am. Rep. 69; *Atkinson v. Goodrich Transportation Co.,* 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352; *Brown v. C., M. & St. P. Ry. Co.,* 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41; *Meyer v. Milwaukee Electric Ry. & Light Co.,* 116 Wis 336, 93 N. W. 6; *Cary v. Preferred Accident Ins. Co.* (decided January 30, 1906), 106 N. W. 1055; *Morey v. Lake Superior Terminal & Transfer Ry. Co.* (Wis.), 103 N. W. 271; *Gilman v. Noyes,* 57 N. H. 627; *Lane v. Atlantic Works,* 111 Mass. 136; *Lowery v. Manhattan Ry. Co.,* 99 N. Y. 158, 1 N. E. 608, 52 Am. Rep. 12; *Jensen v. The Joseph B. Thomas* (D. C.), 81 Fed. 578; *McCauley v. Norcross,* 155 Mass. 584, 30 N. E. 464.

We are of the opinion that the trial court properly awarded judgment on the special verdict.

Judgment affirmed.

MONTGOMERY LIGHT & WATER POWER CO. v. CITIZENS' LIGHT, HEAT & POWER CO.

Alabama Supreme Court — April 20, 1906.

147 Ala. 359, 40 So. 981.

1. CONFLICTING RIGHTS OF ELECTRIC LIGHT COMPANIES — INJUNCTION — SUFFICIENCY OF BILL. — Where two companies each have franchises for the lighting of a city, and a question arises as to the use of the poles of one company by the other, a bill for an injunction is insufficient which merely states conclusions. The size of the poles, their capacity, the number of wires thereon, the proximity of these wires one to another, and their location on the poles, are all material facts, and should be shown by the bill.
2. SAME — AGREEMENT — ARBITRATION. — Where two electric light companies accept franchises from a city and agree that the city may regulate the use of poles and compensation therefor between the companies, such companies are in duty bound to either agree on the compensation or accept the arbitrament of the city electrician, unless shown to be arbitrary or the result of corruption.

Conflicting Rights of Electric Light Companies. — If two electric light companies are granted similar franchises in the same street, the latter if either, must be limited in its use of the street so as not to interfere with the line of the other company. This is not affected by the fact that the latter company has a contract for public street lighting. Not only wanton and

Appeal by the Montgomery Light & Water Power Company from a decree dissolving a preliminary injunction. *Affirmed.*

R. E. Steiner and *Horace Stringfellow,* for appellant.

Phares Coleman and *Crum & Weil,* for appellee.

Opinion by DENSON, J.:

The bill is exhibited by the Montgomery Light & Water Power Company, a corporation, against the Citizens' Light, Heat & Power Company, a corporation. Each of the corporations is possessed of a franchise granted by the municipal authorities of the city of Montgomery, authorizing it to erect and maintain along the streets of the city poles and wires for the purpose of enabling it to supply electric lights to its patrons. The purpose of the bill is to enjoin the defendant from stringing its wires on one of the complainant's poles. On the hearing on the bill and answer, the chancellor dissolved the preliminary injunction, and from the decree of dissolution the complainant appealed.

The complainant is the older of the two corporations and had completed its line. One of its poles (the one involved in this controversy) is located on the northeast corner of Commerce street and Court Square. The only ground for injunctive relief, as

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negligent damage but all interference, not strictly unavoidable with the line of the earlier company, will be enjoined irrespective of the question of additional expense. *Edison Electric Light & Power Co. v. Merchants' & Manufacturers' Electric Light, Heat & Power Co.,* 7 Am. Electl. Cas. 413.

As between two electric companies, each having permission to use the streets, and each furnishing commercial and electric light to citizens, but one only having also a contract with the city to light its streets and public places, the latter, though later in occupation of the streets, has the paramount right and when the poles and electrical appliances of the two companies interfere, the company doing only private lighting, must yield. *Terre Haute Electric Light & Power Co. v. Citizens Electric Light & Power Co.,* 6 Am. Electl. Cas. 193.

A municipal corporation having contracted with an electric company for lighting its streets, and the company in reliance thereon having expended money and erected its poles and strung its wires with the consent and under the direction of the municipal authorities, cannot infringe rights which the company have thus acquired or permit another company to infringe them. Although said company first in occupation does not obtain an exclusive right to maintain its lines in a street, yet the rights of a subsequent licensee are subordinate and must be exercised in such a manner as not to interfere with the rights of another company. *Rutland Electric Light Co. v. Marble City Electric Light Co.,* 4 Am. Electl. Cas. 256, 65 Vt. 377. In the above case, it

shown by the original bill, is found in the third section of th bill, which is as follows:

"The Montgomery Light & Water Power Company already has strung up its pole on the northeast corner of Commerce street and Court Square all t wires that said pole will bear with safety to its service and security to t people of Montgomery, but nothwithstanding this fact, and notwithstandi the fact that said ordinance of the city council of Montgomery expressly fo bade the Citizens' Light, Heat & Power Company from interfering with t poles and wires of orator, nevertheless said Citizens' Light, Heat & Pow Company is attempting to string and is stringing its wires on said pole, a unless it is interfered with it will so string its wires, which will result in irre arable damage to your orator, and make said pole absolutely dangerous to t lives of the people of the city of Montgomery who are walking the stre thereof, and in addition thereto will make it impossible for your orator attend to the securing of its own wires on said pole, endangering the lives its employees who are compelled to frequently climb the said pole for the pu pose of repairing your orator's wire, and prevent it from successfully furni ing current to the people of Montgomery for lights."

The respondent filed a sworn answer to the original bill, speci cally denying each and all the averments upon which the app lant's supposed right of relief was founded. The cause was s down for hearing on motion to dissolve the injunction. On t day fixed for the hearing the bill was amended by attaching as exhibit to the bill a copy of the ordinance passed by the ci council of Montgomery under which the defendant was operatin

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was held that the earlier company was entitled to an injunction perpetua restraining the later one from so maintaining its appliances as to interf by induction with the line of the earlier company to endanger the lives of employees and otherwise to interfere with proper and safe operation of t system.

In *Consolidated Electric Light Co. v. People's Electric Light & Gas C* 4 Am. Electl. Cas. 250, 94 Ala. 372, a complaint in an action by one elect light company for an injunction restraining another company from erecti its poles and stringing its wires along the same streets and among those the complainant, contained the allegations that such proposed constructi would cause the complainant irreparable injury, would continually interf with its business, would burn out its electrical apparatus, and would grea endanger the lives of its servants. It was held that an answer which mer denied that such results would arise "with a reasonably prudent manageme of complainant's system of wires," was not sufficient to authorize the d solution of a temporary injunction. It was also held that a company whi with municipal authority, first occupies a reasonably sufficient space for electrical appliances, thereby acquires the right, not to be molested in possession. See also *Monongahela Light & Power Co. v. Rose Hill Elect Light Co., post*, and note to *Louisville Home Telephone Co. v. Cumberla Telephone & Telegraph Co.*, 8 Am. Electl. Cas. 108, 114.

and by averring "that, if said Citizens' Light, Heat & Power Company is permitted to string its wires on said pole in the manner hereinbefore averred, it will be without the consent of the owner, and the taking of the private property of orator and applying the same to the use of the said Citizens' Light, Heat & Power Company without just compensation being first made therefor." The hearing was postponed, and the bill as amended was answered. We will advert to the answer later on in this opinion.

It is here insisted by the appellee that in considering the motion to dissolve the injunction we should do so upon the bill as it was originally filed, and upon which the injunction was granted, and that no consideration should be given to the facts contained in the amendment to the bill. "In other words, the injunction must stand or fall upon the sufficiency of the bill as originally filed, and cannot be propped up by subsequent amendments. Therefore, if by reason of the insufficiency of the averments in the original bill the injunction was improvidently issued, it was properly dissolved, without regard to the subsequent amendment. In the view that we shall take of the case it is unnecessary for us to determine this question of practice. We remark, however, that in the case of *Mack v. De Bardeleben Coal Co.*, 90 Ala. 396, 8 So. 150, 9 L. R. A. 650, the right to amend an injunction bill seems to be recognized. The ordinance attached by the complainant as an exhibit to the bill as amended, and under which it is alleged the defendant was operating, contains a provision that defendant's wires shall not be erected and strung so as to interfere with the poles and wires of any other company. In a similar case between these same litigants, in which this ordinance was involved, it was said:

"The fact that defendant was under a contract obligation so to erect its poles and wires as not to interfere with the poles and wires of complainant does not change the rule of law that the complainant, seeking an injunction, must by his bill show the necessity for it by the statement of facts, from which the court may decide, and not by the mere statement that complainant will be irreparably injured. The only difference is that, if the contract prescribed any terms different from those which the law would demand without the special contract, then the allegations must be of facts which would show a violation of the contract or condition prescribed by the city ordinance, which if there were no contract or ordinance prescribing conditions, the allegations would have to show facts from which the law would infer actionable injury."

In this respect it would seem that it cannot be successfully tended that the averments of the original bill are more than clusions of the pleader. The size of the pole, its capacity, number of wires thereon, the proximity of these wires on another, or their location on the pole, are material facts w undeveloped by the bill, original and as amended. *Montgo Light & Water Power Co. v. Citizens' Light, Heat & Power pany* (Ala.), 9 Am. Electl. Cas. —, 38 So. 1026.

Neither of the parties claim any exclusive privilege or chise to use the streets of the city. Such claim, if it were n would be futile under the principles of law applicable to the of franchises by municipal corporations to corporations or na persons for the purpose of erecting and maintaining public ties. Const. § 22; *Montgomery Light & Water Power Com v. Citizens' Light, Heat & Power Company, supra,* and aut ties there cited. By the amendment to the bill it would that the complainant does claim the exclusive ownership privilege with respect to the pole in controversy; and the i ence by the appellant is that the bill as amended shows tha respondent was, by stringing or attempting to string its wir the pole as alleged, taking or attempting to take the private erty of the appellant without its consent and without just pensation being first made therefor. Therefore it is argue the appellant that the bill as amended is brought within that of cases in which it has been held that where "it is affirmat and distinctly averred that property of which the complainant possessed has been wrongfully taken possession of by a defen which has not proceeded to its condemnation in the mode scribed by law, and has not, in obedience to the Constitution, therefor just compensation, these facts of themselves, withou gard to any question of irreparable injury, give the court j diction to prevent the further invasion of the property by in tion." The court in the case of *Highland Ave. & Belt R. R. v. Matthews,* 99 Ala. 24, 10 So. 267, 14 L. R. A. 462, spea of this branch of equity jurisdiction, said:

"The jurisdiction of a court of equity to prevent the commission of a wrong is not based upon the absence or inadequacy of legal remedies f recovery of damages for the wrong when it has been consummated. recognized equitable remedies may find support upon either of two gro (1) Upon the special jurisdiction of courts of equity to confine corpor

to the exercise of the powers conferred upon them by law; and (2) upon the inadequacy of legal remedies to protect the constitutional right in its entirety, courts of law being unable to compel the payment of compensation to the property owner before his property is taken, injured, or destroyed."

In this view of the case it would be of importance "to subject to analysis the allegations of the bill, and determine whether irreparable injury, in the sense of that term in a court of equity, is shown by them." *Birmingham Traction Co. v. Birmingham Ry. & Elec. Co.,* 119 Ala. 129, 24 So. 368; *Birmingham Traction Co. v. Sou. Bell Co.,* 119 Ala. 144, 24 So. 731.

Granting that the averments of the bill as amended show that the respondent is a corporation vested with the authority to exercise the right of eminent domain, we must examine the case as presented by the bill as amended and the sworn answer thereto, and determine whether or not the injunction was rightfully dissolved. In its answer to the bill as amended the respondent makes specific denial of the facts set up in the amended bill, and also avers that at the time the complainant was granted by the city authorities the franchise under which it was operating there was in force in the city an ordinance which provided that all companies erecting or operating electric light and power wires, telephone and telegraph wires, or any other wires in the streets or along the alleyways or across the public places of the city of Montgomery, should occupy the same poles that were at such time in use by any other electric company, whenever such joint use was practicable, to be determined by the committee of electric control of the said city council of Montgomery, and that the company so stringing its wires upon any pole or poles already in use by any electric company should pay to the latter such rental or compensation for the joint use of such poles as said companies might agree upon, and, if they failed to agree, then such as may be fixed by the city electrician of the city of Montgomery. It is further shown in the answer that by an ordinance contract made on the 30th of April, 1902, "between the appellant and the city council of Montgomery, all poles then or thereafter erected and all wires then or thereafter strung by appellant should be subject to the then existing or any future ordinance that might be passed as far as applicable, and that the city council, in its discretion, might grant permission to any other electric light, telegraph, telephone, or other companies using wires to string their wires upon the poles

of appellant, upon condition that such other companies sho pay a reasonable compensation for the use of said poles." I then shown by the answer that the city council of Montgom adopted a resolution whereby the committee of electric control said city council, together with the city electrician, were direc to designate what poles in use by other companies along the r described by the city electrician for this respondent to string w should be used by the respondent, and to determine which of poles so designated it was practicable for respondent to use stringing its wires jointly with the complainant. It is then sh that the committee on electrical control and the city electri ascertained that the joint use of the pole in controversy was p ticable, and the committee on electrical control, after invest tion, authorized and directed respondent company to string wires on said pole. It is further shown that, the parties (c plainant and defendant) having been unable to agree on compensation to be paid, the city electrician fixed the amo which appellee tendered to the complainant, and the complai refused and declined to accept the amount.

The complainant having accepted its franchise under the ditions stipulated in its contract and the ordinances of the then in existence, it cannot be said that it is not bound by qualifications fixed upon the franchise by the contract and o nance. It is obvious from a glance at the contract and ordina in the record that the city, as it had a right to do, reserved right to regulate the use by complainant of the poles set by it, proceeding in accordance with the terms of the ordinances contract, that it had the right to determine whether or not it practicable for the defendant to use the pole in controversy joi with the complainant; and in doing this we will presume it was done by the authorities with due consideration for rights of the parties and the safety of the public, and furt that under the direction of the city authorities the respon might use the pole, making compensation to complainant as quired by the law. Under the denials in the answer, which specific and full, and the averments therein which are respon to the bill, it seems to us that the injunction could not be retai on the theory that appellant's property was sought to be ta without just compensation. It is true, the compensation was

paid, but it is also true that it was the complainant's fault that it was not. The amount of compensation was fixed, as was required by the ordinance it should be, after the complainant had declined to agree with the defendant on the amount. The amount fixed was tendered to the complainant, and it declined to receive it. We do not see what more could have been done by the defendant, and the complainant cannot be allowed to make a case on this point for equitable interference by its obstinacy.

We are aware that it was said in the case of *Birmingham Traction Co. v. Birmingham Ry. & Elec. Co., supra,* that refusal or failure to agree on the amount of compensation to be paid afforded no right or excuse for the taking of property of another without condemnation proceedings and payment of compensation. Granting that this is a case in which condemnation proceedings might have been resorted to, that case is not an analogous case. In that case there was no duty to agree. Here both parties were acting with respect to privileges granted them by the municipality and with respect to property over which the municipality had reserved the right of regulation with regard to the very matter in dispute. The appellant, having accepted its franchise under the conditions adverted to, was in duty bound to either agree on the compensation or accept the arbitrament of the city electrician, unless shown to be arbitrary or the result of corruption.

Finally, we conclude, as did the chancellor that it is the safer course to allow the direction of the municipal authorities to prevail until upon a final hearing the merits of the respective contentions may be fully examined and made plain. The decree dissolving the preliminary injunction is affirmed.

Affirmed.

WEAKLEY, C. J., and HARALSON, and DOWDELL, JJ., concur.

JONES v. UNION RAILWAY COMPANY.

New York Supreme Court, Appellate Term — April 24, 1906.

50 Misc. 651, 98 N. Y. Supp. 757.

DEATH OF HORSE BY CONTACT WITH WIRE WHICH HAD BEEN THROWN O TROLLEY WIRE — EVIDENCE — CONTRIBUTORY NEGLIGENCE. — In an ac against an electric railway company for damages for the killing horse, it appeared that when the plaintiff was driving along defend track one of his horses came in contact with a wire which had by means been thrown over defendant's feed wire. The horse receive electrical shock from which it immediately died. There was no evid how long the wire had been in this position except that one of defend motormen had passed the spot eight minutes before and did not ob it. It was held that the evidence was not sufficient to show the rai company guilty of negligence, and that the question of the plain negligence was a question for the jury.

Appeal by the defendant from a judgment in favor of the pl tiff rendered in the Municipal Court of the city of New Y *Reversed.*

Before SCOTT, P. J., and TRUAX and BISCHOFF, JJ.

William E. Weaver, for appellant.

Headley M. Greene, for respondent.

Opinion by SCOTT, P. J.:

The defendant operates its railway by means of an overh trolley. About half-past 5 o'clock on the 20th day of Aug 1905, the plaintiff was driving a truck with two horses along fendant's tracks, when one of the horses came in contact wi wire which had by some means been thrown over and then h from defendant's feed wire. The horse received an electr shock, from which it immediately died. The wire was not kind used by the defendant, and evidently was no part of equipment, and the circumstances pointed irresistibly to the clusion that some mischievous person had thrown this loose p of wire over defendant's feed wire, and left it dangling th There was no evidence how long the wire had been in this posit except that one of defendant's motormen said that he had pa

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Injury to Horses from Contact with Live Rail. — See *Wood v. mington City Ry. Co., ante,* and note thereunder.

the spot eight minutes before and had not observed it. Under these circumstances there was no evidence of defendant's negligence to submit to the jury. We think, also, that the justice erred in withdrawing from the jury altogether any question as to plaintiff's negligence. While he had a right to assume that the road would be unobstructed, he was not wholly relieved from the obligation to be reasonably vigilant in watching for unexpected and unusual obstacles, and it was at least a question for the jury whether, if he had been so vigilant, he would not have seen the wire before he reached it.

Judgment reversed, and new trial granted, with costs to appellant to abide the event. All concur.

VICKSBURG RAILWAY & LIGHT CO. v. MILES.

Mississippi Supreme Court — April 30, 1906.

4 St. Ry. Rep. 556, 40 So. 748.

ELECTRICITY — INJURY TO HORSE CROSSING TRACK, BY REASON OF ELECTRIC SHOCK. — Where a horse was injured while crossing the track of an electric railway by reason of an electric shock, plaintiff was entitled to offer evidence to show by a continuous series of instances that other horses had received similar shocks by stepping on the tracks of such company at other places on its line, and that the officials were fully advised and notified, as tending to show the continued negligence of the company in not keeping its track in a safe condition.

Appeal by defendant from judgment in favor of plaintiff. *Affirmed.*

Suit for damages to recover the value of a horse alleged to have been injured while crossing the track of the appellant street railway by receiving an electric shock which threw him to the ground, breaking his leg, thereby rendering him useless to his owner, who had him shot. The proof for the plaintiff below shows that the horse stepped on the track near the power house, fell suddenly to the ground, and was found to have broken a leg. Plaintiff offered evidence to show by a continuous series of instances that other horses had received similar shocks by stepping on the track of the appellant railway company at other places on its line, and that the officials were fully advised and notified. The evidence was objected to by the railway company, for the reason that it did not show a specific defect, but was admitted by the court on the ground that it tended to show the continued negligence of the railway company in not keeping its track in a safe condition. The defendant entered a plea to the general issue. The case went to

a jury, and resulted in a verdict and judgment for the plaintiff, from
this appeal is prosecuted.

Smith, Hirsh & Landau, for appellant.

Hudson & Fox, for appellee.

Opinion by CALHOON, J.:

It cannot be doubted that the injury to the horse was cause
a loose connection of the bond wires, preventing proper gr
connection, thus causing an arc along the track on the passa
the train. To show that this did not arise from an unavoi
accident, not to be foreseen or provided against, but that it
because of long-continued negligence over the whole of the
and which was the subject of complaint to the company, as c
lative evidence that electricity caused the hurt, it was comp
to show other shocks to other animals in other parts of the
operated by one current, and complaint made. See 15 Cyc.
and notes. This involves no danger of a confusion of issues.
electric current over a car line is a continuous stream, and,
erly bonded and connected is free from danger, and a matt
easy proof by the operator. In showing that electricity,
gently controlled, was the origin of the particular event, it
properly allowed to show other instances of similar results
the same circuit. 1 Wigmore on Evidence, §§ 441–443; Id.,
to page 542. It is of the same nature as evidence of fre
emission of sparks by an engine to show its negligent cons
tion, and adding to the probability that it set out the parti
fire. An electrical current over the same conductor is ju
much one thing as an engine is. 1 Wigmore on Evidence, §
et seq.

Affirmed.

WITMER v. BUFFALO AND NIAGARA FALLS ELECTRIC LIGHT AND POWER CO.

New York Appellate Division, Fourth Department — May 2, 1906.

112 App. Div. 698, 98 N. Y. Supp. 781.

1. DEATH FROM CONTACT WITH INCANDESCENT LIGHT — EVIDENCE. — In an action against an electric light company to recover damages for death caused by an electric shock, it appeared that the decedent hearing a buzzing noise in an electric circuit which lighted his house took hold of an incandescent light wire in his cellar supposed to carry a harmless current and received a shock which killed him. On the issue whether the high-tension current came from wires maintained by the defendant and for the condition of which the defendant was responsible or whether it came through a fire alarm wire which broke and fell upon the high-tension wire for which accident defendant would not be liable, the court on all the evidence held that the question was properly left to the jury.
2. SAME — INSTRUCTIONS — CARE REQUIRED. — It was proper for the court to charge that the defendant was required to use reasonable care in constructing and maintaining its electric system to prevent the secondary wire which entered the plaintiff's house from being charged with a high voltage current.
3. SAME — CONTRIBUTORY NEGLIGENCE. — Where it appeared that a house circuit was not supposed to carry a high-tension wire current, the question of the contributory negligence of a person killed by a shock from such house circuit was for the jury.
4. SAME — WHEN LIGHTING CONTRACT DOES NOT RELIEVE FROM LIABILITY FOR NEGLIGENCE. — Where a contract for lighting a house provided that the lighting company should not "be liable in any event for damage to person or property arising, accruing or resulting from the use of the light," such company was not relieved from liability for negligence in permitting an excessive current to enter said house from its wires.
5. SAME — EVIDENCE — RES GESTÆ. — In an action to recover for death caused by shock from an incandescent light, declarations made by the deceased to his wife just before the accident when turning off the switch, in response to her asking him to be cautious, stating that there was no danger and that a dangerous current could not get into the house, were admissible as part of the *res gestæ*.

Appeal by the defendant from a judgment of the Supreme Court in favor of the plaintiff and from an order denying defendant's motion for a new trial. *Affirmed.*

The action is brought to recover damages for the death of plaintiff's husband through negligence of the defendant, resulting from his coming in contact with a highly overcharged wire in the home of deceased at Niagara Falls

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Injuries from Shock from Incandescent Light. — See note to *Peters v. Lynchburg, etc., Light Co., post.*

on the 27th day of September, 1903. The claim of the plaintiff is that wires used for supplying light to the deceased had become overchar through the defendant's negligence, and the deceased, being unaware of dangerous condition, took hold of an extension cord, at the end of which an electric light bulb used for lighting the cellar or basement of the ho and was killed.

Before McLENNAN, P. J., and SPRING, WILLIAMS, NASH, a KRUSE, JJ.

Maurice C. Spratt, for appellant.

Fred M. Ackerson, for respondent.

Opinion by KRUSE, J.:

That Loren T. Witmer came to his death by coming in cont with a wire overcharged with a deadly current of electricity scarcely disputed. Neither is the fact sericusly controverted t ordinarily the current was not deadly, or even dangerous. T incandescent electric lighting was used in this house. The inc descent circuit voltage was about 2,200, carried on two prim wires, which distributed the electricity about the city. Tra formers were placed in various parts of the city, which redu or stepped it down, as it is stated, from a voltage of 2,200 about 106, and at this reduced voltage it was used for light the houses and other places. Less than 500 voltage is, un ordinary circumstances, not dangerous to human life, so that, the deceased came to his death by coming in contact with a curr of electricity, it is reasonably certain that the current excee the usual house-lighting voltage.

No claim is made that the defendant is liable for the wiring the house, for that was not done by the defendant. The s claim of the plaintiff is that the defendant, through its want care and attention in respect to the matters which will be adver to a little later, was responsible and became liable for the cor quences resulting from the overcharged condition of the wires this house, which caused the death of the deceased, and that qu tion is the serious question presented by this appeal.

It appears that on the early morning of September 27, 19 between 2 and 3 o'clock in the morning, an unusual buzzing no was heard. The deceased was awakened by his wife, and dently determined that the disturbance was due to electricity,

he went upstairs, and turned off the entrance switch connection. His wife warned him to be careful, and he replied that there was no danger; that there couldn't enough come in to hurt anybody; that it would blow out the transformer before it would come in. After turning off the switch, they proceeded on their way downstairs, and the buzzing noise came on again. The cellar indicator in the dining room showed that there was light in the cellar. He started down cellar. The noise continued about a second. It had ceased before he opened the cellar door. On his way down he struck a match. The cellar was usually lighted by an electric bulb attached to the end of a cord. The cord was about seven or eight feet long, and when not in use was hung up. He took hold of the cord, lifted it towards him; the match was going out. His wife said, "I will go and get a light for you." After she had turned and gone for the light, the buzzing sound came on again, the bulb lighted up, and at the same time the deceased groaned and fell. She was at the head of the cellar stairs when she saw him take hold of the wire. His wife and sister picked him up, and put him in a sitting position. His wife went for a doctor, and at her return the deceased had been carried upstairs by his father and his sister; they were working over him, but he was evidently dead, for they were unable to revive him.

The high tension wire of the arc system carried a voltage of 7,500. That this current was communicated in some measure and by some means to the wires of the residence of the deceased is reasonably certain; indeed, both parties so claim. The serious question is, whether it was done, as is claimed on behalf of the plaintiff, by the proximity of the arc and incandescent wires and their sagging, or by the limbs of a tree through which the two wires passed connecting them, thus surcharging the incandescent wire, or both; or whether, as is claimed on behalf of the defendant, the fire alarm wire fell upon the high tension arc wire, conveying the current in some manner to the telephone wire, and then from the telephone wire to the incandescent wire, and eventually finding its way into the home of the deceased. If the latter, then under the rule of law adopted by the learned trial court a recovery against the defendant cannot be sustained, for such was the charge to the jury. It seems reasonably certain that the fire alarm wire fell upon the high tension arc light wire, or in some way the cur-

rent from the high tension wire was communicated to the fi alarm wire, but it is still open to doubt as to whether this ove charged current was communicated to the telephone wire, an from the latter to the incandescent wire, and from thence int this house. It was a stormy night, and high winds prevaile The alternate buzzing and the light coming on momentarily an then disappearing would seem to indicate that there was an alte nating current transmitted to the wires in this house. The d fendant contends that this same condition was apparent on t fire alarm system, as testified to by the person in charge, at abo the same time that the accident occurred; thus lending creden to the claim that the current was not only alternating, but m well have been caused by the swaying motion of the wires, th causing intermittent contact, or proximity of wires sufficient close to communicate the current from the high to the low tensi wires. The defendant contends that this intermittent current w produced by the swaying of the telephone wire by the wind, whi the plaintiff contends that it was the swaying motion of the oth wires and the intermittent contact between the two wires co municated by the limbs of the trees which were being swayed the wind. Witnesses were called upon both sides testifying what they observed before and after the accident with referen to conditions in the trees and on the wires and transformers, a other conditions which might throw some light upon the questi

Without going into the details of the testimony, we think t evidence presented a fair question of fact for the jury, and findi

ground, and that the deceased knew that, and was reasonably familiar with the dangers of electric current; but it must be remembered that ordinarily the house wires did not carry a sufficiently strong current to make it dangerous, so that from the lack of insulation or for any other reason would be dangerous to take hold of this extension cord. Under all the circumstances, it was a question of fact for the jury to determine whether the deceased was free from contributory negligence.

The contract under which the defendant supplied light to the deceased contained the following provision:

"In case the supply of light should fail, whether from natural causes or accident in any way, this company shall not be liable for damage by reason of such failure, nor shall it be liable in any event for damage to person or property arising, accruing, or resulting from the use of the light."

It is contended by the defendant that this provision exonerates the defendant from liability for damages, even if caused through its own negligence. We cannot assent to this claim. Contracts of this character, to warrant such a construction respecting the negligence of a party in omitting a plain legal duty, must do so in terms and expressly provide to exempt from such liability. *Nicholas v. N. Y. C. & H. R. R. R.*, 89 N. Y. 370; *Jennings v. G. T. & G. Co.*, 127 N. Y. 438, 28 N. E. 394; *Rathbone v. N. Y. C. & H. R. R. R.*, 140 N. Y. 48, 51, 35 N. E. 418.

As regards the statements made by the deceased to his wife when the switch was being turned off, stating that there was no danger, that a sufficient current could not get into the house, in response to her statement asking him to be careful, we think they constitute a part of the *res gestæ*, and were competent. *Waldele v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 274, 279, 47 Am. Rep. 41; *Landon v. P. A. Ins. Co.*, 43 App. Div. 487, 60 N. Y. Supp. 188.

We conclude that the verdict of the jury should not be disturbed, and that there are no errors requiring a new trial.

The judgment and order should be affirmed.

DELAHUNT ET AL. v. UNITED TELEPHONE & TELEGRAPH CO.

Pennsylvania Supreme Court — May 14, 1906.

215 Pa. 241, 64 Atl. 515.

1. TELEPHONES — DEATH OF SUBSCRIBER — RES IPSA LOQUITUR. — The doctrine of *res ipsa loquitur* applies where a subscriber on taking hold of the transmitter receives a shock killing him instantly.
2. SAME — DUTY TO PATRONS. — It is the duty of a telephone company to exercise at all times the highest degree of care and vigilance to protect patrons from a dangerous electric current over its wires from any source.
3. SAME — CONTRIBUTORY NEGLIGENCE. — A patron of a telephone company, knowing that the current of electricity necessary to operate a telephone was harmless, was not guilty of contributory negligence in taking hold of the transmitter while standing on a wet carpet.

Appeal by defendant from judgment for plaintiffs. *Affirmed.*

At the trial Mary G. Lenny was asked this question: "Q. How is Margaret as to being in possession of all her faculties? Mr. Geary: That is objected to. It is not a question of the child's condition. The Court: The child's condition might be such as to make the father liable to contribute more to it than he ordinarily would. The objection is overruled. (Exceptions noted for defendant.)" The court admitted under objection the letter from defendant's manager to Thomas F. Delahunt, quoted in the opinion of the Supreme Court. The court also admitted under objection the testimony of James Mullen taken at a former trial of the case.

The court charged in part as follows:

"The deceased, it appears took hold of the telephone, either to use it, or for some purpose, and under the ruling of the court that was a thing he had a perfect right to do. This defendant company having supplied him with a telephone for his use, he had a right to believe that they would supply him with an instrument which would be perfectly safe to use in the ordinary way, and consequently having been injured in taking hold of the telephone the court has held, and instructs you, that that is sufficient evidence, when uncontradicted, of the negligence of the defendant. It has been urged upon you by the defendant's counsel that the deceased, the father of the plaintiffs, was guilty of contributory negligence. If

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Duty of Telephone Companies to Patrons. — Although telephone companies inviting the public to use their instruments are not insurers (*Bruckner v. Gainesboro Telephone Co.*, *post*, 125 Ky. 92, 100 S. W. 238), and are not obliged to guarantee the safety of their system under all possible conditions (*Wells v. Northeastern Telephone Co.*, *ante*, 101 Me. 371, 64 Atl. 648), they must exercise a high degree of care to protect their patrons from the dangers incident to the business and to protect patrons from a dangerous electric current over its wires from any source. *Byron Telephone Co. v. Sheets*, *ante*, 122 Ill. App. 6.

he was, if his own negligence contributed in any way to the accident, these children cannot recover. The contributory negligence alleged is that having heard a sound, or clicking, which one of the witnesses described as resembling the noise of a cricket, he ought not to have touched the telephone. You will consider whether that testimony shows that there was anything which occurred that night to put him on his guard or warn him that it was dangerous for him to touch that telephone. Both of the witnesses said they heard this noise and that he went over and took hold of the speaking transmitter and pulled it down, and the injury happened immediately after. What had occurred to warn him that that was a dangerous thing to do? In order to use the transmitter it would be necessary for him to pull it down to a height that would enable him to speak into it. The fact that the floor was wet you will consider; you will consider whether there was anything which would cause a reasonable man to suppose that he might not use that telephone in the ordinary way, and if there was nothing to so warn him, and put him on his guard, he would not be guilty of any contributory negligence."

Verdict and judgment for plaintiffs for $10,175.89.

Before MITCHELL, C. J., and FELL, BROWN, ELKIN, and STEWART, JJ.

A. B. Geary and *Joseph H. Hinkson,* for appellant.

O. B. Dickinson and *John E. McDonough,* for appellees.

Opinion by BROWN, J.:

The father of the appellees was a patron of the appellant. During the month of February, 1902, there was a severe storm, and the connection of his telephone with the exchange was broken. This disconnection continued for some weeks, and, according to the theory of the appellant, which seems to be accepted as correct, the telephone was not connected with the exchange at the time the decedent was shocked to death in taking hold of the transmitter. The allegations of the appellees, as set forth in their statement, is that the appellant, " by its careless and negligent management of its wire system, permitted one of its wires, which was not properly insulated, to come in contact with the wires of another company, heavily charged with electricity, whereby the said electric current was conveyed to the said telephone of said Thomas F. Delahunt when he was making proper and lawful use thereof, whereby by reason of the premises and the negligence of the said defendant company he received a heavy shock of electricity and was thereby then and there killed." During the disconnection of the decedent's telephone with the exchange he received a letter from the

manager of the company, which was properly admitted in dence by the court, and of which the following is a copy:

"United Telephone and Telegraph Company, Chester, March 18, 1902. Thomas F. Delahunt, 21st and Edgmont avenue, Chester, Pa. — Dear I regret to hear you have been among the unfortunate subscribers li along Edgmont avenue, and assure you we are making every possible e to get you back into service, and hope to do so by the last of this week or first of next. I will gladly make your 'phone one of special import and get you connected at the earliest possible moment. We are goin renew your service up Walnut street, thus explaining the seeming ne of that part of the city. Yours very truly, W. P. Hull, Manager."

On the evening of April 9, 1902, a sound resembling the n made by a cricket came from the direction of the telephone, the deceased said: "I believe that is the 'phone. I wonde it is in use." He then got up, walked over to it, and took hol the transmitter with both hands, drawing it down. As he so there was a flash of flame all around the telephone, and he almost instantly killed by an electric shock. After the appel had shown this they were about to prove the specific ne gence charged against the appellant, when the learned trial ju evidently of opinion that the case came within the rule *res loquitur,* told them that it was not necessary to do so, and that testimony which they proposed to offer might be admissible rebuttal, if the defendant should show it had exercised pr care. It offered no testimony, and on this appeal from the ju ment on the verdict against it the important and main quest is the correctness of the ruling of the trial judge that the plaint were not required, in the first instance, to prove more than their father was killed by an electric shock in using the ins ment which, with its connections, the appellant had furnishe him as one of its subscribers.

This ruling was made on the authority of *Alexander v. Na coke Light Co.,* 9 Am. Electl. Cas. 188, 209 Pa. 571, 58 Atl. 1 67 L. R. A. 475. Electricity is the agent by which telepho become the means of communication from one point to anot and it may be conceded, as the appellant contends, that the cur needed for their use is not a dangerous one. In this case it be still further conceded that the current with which the dece came in contact did not come from the exchange of the appell but at the same time it cannot be questioned that it came over of its wires leading to the telphone of one of its patrons. Tho

this wire was intended to conduct only a harmless current the appellant was bound to know that it could become the conductor of a deadly one, and that such a current would pass over it, if it was not properly insulated, and should come in contact with a wire heavily and dangerously charged. It was, therefore, as much the duty of the company to see that no such current should thus pass over its wires as it was to send only a harmless one from its own exchange. Its duty to its patrons was to exercise at all times the highest degree of care and vigilance to protect them from a dangerous electric current over its wires from any source. This is the implied undertaking of every telephone company, and in towns and cities threaded with dangerous electric wires the duty of the company is, by constant supervision of its wires, to prevent their becoming conductors of a dangerous current from others. When they do become conductors of it, there is reasonable evidence that there has been a neglect of duty, and the burden is cast upon the telephone company of showing that it had not been negligent. As it is not an insurer of its patrons against the danger of electric currents on its wires, the law will not hold it responsible for what it cannot help and for what may happen in spite of its exercise of the care and vigilance required of it; but when, as here, there is an accident, which in itself affords reasonable evidence of negligence, it must show why it should be relieved from liability. The rule upon this subject, as laid down in *Scott v. London, etc., Docks Co.*, 3 Hurlst. & C. 596, is:

> "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanations by the defendants, that the accident arose from want of care."

This rule, reannounced in *Oil Co. v. Penna Torpedo Co.*, 190 Pa. 350, 42 Atl. 707, is not stretched in applying it to the present case.

By a number of assignments of error we are asked to say that the court erred in not directing a verdict for the defendant on the ground of the contributory negligence of the deceased. Counsel for appellant very properly state that the current of electricity necessary to operate a telephone will injure no one. The deceased knew this, and, of course, felt that his telephone was as harmless

as it was useful, and there was no reason why he should hesitated to take hold of the transmitter. He had been no by the manager of the company that the connection of his phone with the exchange would be established "at the ea possible moment," and when he heard the noise coming fro he evidently thought it had been connected, for he said: believe that is the 'phone." In then getting up, walking ov it and taking hold of the transmitter, he did just about what body else would have done under the circumstances; but be he happened to stand on a wet carpet and the transmitter made of metal, it seems to be seriously contended that he guilty of negligence, and that the court ought to have so instr the jury. If the current of electricity needed for telephones dangerous, a consideration might possibly be given to this pr tion, but it cannot be so dignified under the facts in the pr case. In submitting the question of the contributory negli of the deceased to the jury, the appellant was given a chan escape, of which the appellees might fairly have complaine the finding had been against them. The assignments of the a lant relating to this feature of the case are all overruled.

One of the appellees, a daughter of the deceased, is a deaf who was about seven years of age at the time of her fa death. In allowing her condition to be made known to the the learned trial judge stated that, in view of it, the father have been liable to contribute more to her support "than he narily would." This remark was true, as a matter of fact, as a legal proposition, did no harm to the appellant, for the were distinctly instructed in language that they could not misunderstood, that if the appellees were entitled to recove amount of the verdict would have to be limited to compens to them for loss of what they could have expected from their f for their support and education while in their minority, d which period he would have been entitled to their earnings.

When the testimony of James Mullen, taking at a former of the case, was offered, objection was made that it had not proven that proper effort had been made to secure the atten of the absent witness. This was a matter for the court b with the proof before it of the effort that had been made to pœna the witness, and no error was committed in admittin

testimony. Of the assignments relating to the charge of the court and the refusal to affirm defendant's points, nothing need be said, except that they are all overruled. If the verdict was excessive, it was for the court below to correct it. It is not so manifestly unjust as to call for our interference with it.

Judgment affirmed.

MEHAN ET UX. v. LOWELL ELECTRIC LIGHT CORP.

Massachusetts Supreme Judicial Court — May 17, 1906.

192 Mass. 53, 78 N. E. 385.

1. DEATH OF OILER BY SHOCK FROM IRON BAR — CONDUCT IN EMERGENCY — QUESTION FOR JURY. — In an action by plaintiffs against an electric lighting company to recover for the death of their son, an oiler, it was shown that the deceased met his death while employed in the defendant's power house by receiving a shock from an iron bar, that at the time of the accident he was assisting another employee to reach the source of trouble in the power house; *held*, that the question whether the emergency justified and required the deceased to give the assistance which he did was for the jury.
2. SAME — EVIDENCE. — Evidence held to be sufficient to justify the jury in finding that the defendant was negligent in not properly grounding the current from a switchboard whereby the deceased was killed.

Exceptions by defendant from judgment in favor of plaintiffs. *Exceptions overruled.*

John L. & Wm. A. Hogan, for plaintiffs.

Wm. H. Bent, for defendant.

Opinion by LORING, J.:

1. We are of opinion that the seventh and tenth rulings asked for were rightly refused.

The defendant's first contention in support of these rulings is that there was no evidence showing due care on Mehan's part even if he had a right to be where he was, and the case comes within such cases as *Cox v. South Shore R. R.*, 182 Mass. 497, 65 N. E. 823, and *Clare v. New York & New England R. R.*, 167 Mass. 39, 40, 44 N. E. 1054. But it is to be noted that the iron pillar from which Mehan received the fatal shock was but three inches from the engine room floor on which Mehan was standing at the

time, and while it is true that the evidence did not warra
finding that the shock was received before Livesey had pa
through the opening made by pushing back the upper bar, it
warrant the finding that it was received within a few seconds a
The jury were warranted in finding that Mehan and Armst
helped Livesey in pushing the bar through the socket on
wooden post, that Livesey rushed through the opening so m
with his sand pail, to the regulator in question, some twenty
from the bar, and was in the act of throwing the sand on
regulator when Mehan received his shock. If the emergency j
fied and required Mehan to be where he was, the evidence in
opinion warranted a finding that Mehan was in the exercise of
care.

And we are of opinion that the emergency did justify and
quire Mehan to be where he was. The emergency in ques
was described by Mehan's superior, the engineer, as follows:

> "A report like thunder, only it was not like thunder, and a flash li
> flash of lightning. The third regulator from me was smoking, and a
> flame coming out of one corner was on the chain cable leading up to the
> it looked like two tapers; the tape insulation was burning."

This happened at 6:05 in the morning, when there were
three persons in the building, the switch board tender, Live
the engineer, Armstrong, and the oiler, Mehan, whose deat
the subject of this action. Mehan immediately rushed to the
which had to be unscrewed and pushed through the socket be
Livesey could get into the electrical inclosure on the floor in q
tion, and Armstrong, after seeing to the engine which was t
running, followed. The evidence warranted the finding that
three took part in getting the bar out of Livesey's way. In
opinion the question whether that emergency justified and
quired Mehan to give the assistance which he gave was for
jury, although he was employed to oil the engines. See *Some*
& Cambria R. R. v. Galbraith, 109 Pa. 32, 1 Atl. 371; *Te*
Haute R. R. v. Fowler, 154 Ind. 682, 56 N. E. 228, 48 L. R.
531; *Pullman Car Co. v. Laack,* 143 Ill. 242, 32 N. E. 285,
L. R. A. 215; *Sears v. Central R. R. & Banking Co.,* 53 Ga. 6

This conclusion is fortified by the testimony of Mehan's
mediate superior, Armstrong, the engineer, that " in case of fir
I understood it his duty was to assist in puting it out if possibl

and by the fact testified to by Livesey that there was a fire four or five weeks before the accident here in question, which he (Livesey) assisted in putting out, and "Armstrong and Mehan were there assisting."

The defendant's last contention is that no reason is disclosed why Mehan took hold of the post, if he did, and no invitation for him to do so. The post was but three inches away from the engine floor where the emergency called Mehan, and he might unintentionally have come in contact with it.

2. We are of opinion that the jury were warranted in finding that the defendant was negligent, and that the accident was caused by its negligence. We assume that the defendant was not liable for grounding the iron framework of the switch board gallery by carrying from it a copper wire to a metal plate buried in the ground, in place of connecting it with the water pipes, because the former method was in common use although not so good a method as the latter. But the jury were warranted in finding that the company knew from the shocks received on the day before the accident by the masons then at work in the basement, that the system in use was not in fact carrying off the electricity which found its way into the framework, and that it was negligent in continuing under these circumstances without giving notice of the danger, and that that negligence caused Mehan's death because the current in the iron post took the line of least resistance through his body and the engine room floor to the water pipes. For these reasons the first ruling was in our opinion rightfully refused.

3. The eleventh ruling asked for was given in substance. The presiding judge told the jury that:

"The law does not say that because an accident happens therefore the employer was liable; that would be reasonable if he was an insurance company, but it is not so. But it assumes an employer to discharge his duty reasonably, with reasonable care, to see the machinery is in proper condition, as would be safe from injury or death; would discharge that duty just as you or I in his place would do."

The word "assumes" would seem to be a misprint. However that may be, in answer to a question from the defendant at the close of the charge as to whether he gave this ruling the presiding judge added:

"I have said to the jury, without your limitations, as I understand it, that the mere occurrence of an accident would not be evidence of negligence. That is more general than the request, and therefore carries it."

4. The other contention made by the defendant is that the dence did not warrant a finding that the father and mother of deceased was dependent on him for support within Rev. Laws 106, § 73.

It is settled that partial dependence is enough. *Mulhall Fallon,* 176 Mass. 266, 57 N. E. 386, 54 L. R. A. 934, 79 A St. Rep. 309; *Welch v. N. Y., N. H. & H. R. R.,* 176 Mass. 3 57 N. E. 668; *Boyle v. Columbian Fire Proofing Co.,* 182 M 93, 64 N. E. 726. The case relied on by the defendant (*Hod v. Boston & Albany R. R.,* 156 Mass. 86, 30 N. E. 224) wa case where it did not appear that the plaintiff did not supp herself by her own wages. See *Mulhall v. Fallon,* 176 Mass. 2 267, 57 N. E. 386, 54 L. R. A. 934, 79 Am. St. Rep. 309.

The evidence warranted a finding that at the time of the s death the family consisted of father, mother, two daughters one son in addition to the son whose death is the subject of action. The son whose death is here in question was killed December 11, 1903. The father and mother had no prope and no money in bank. The father was seventy and the w sixty years old. The father seems to have had no regular wo he testified that he "worked for Mr. Rose from May until Nov ber and received fifteen cents an hour, averaged nine hours a d averaged five days a week. In the winter I got $10 a month Currier's furnace and $3.50 a week for Rose's furnace." father also testified that his "wife is not an invalid; she i very well now;" and she testified that she "had suffered fo long time from neuralgia; sometimes could not perform ho hold duties." Jennie, the younger daughter, had not worked two years, but had stayed at home and helped her mother in c ducting the household; she "did the ordering." Joseph entered the Tufts Medical School in October, 1902, and si then had lived at home and had his breakfast and supper th while the school was in session, and apparently all his meals d ing vacation. He worked during the four months' summer h day. During this time he had received nothing from the fam except his lodging and the meals mentioned above, and had c tributed nothing to its support. The daughter Mary worked the Hamilton," and received from $7 to $8 a week. The who was killed received $12 a week, which he handed to

mother. The mother testified that since the accident "My family remains the same now with the absence of the one who is killed. We live in the same house, pay the same rent, live as comfortably as we can; we have plenty to eat and drink and wear, and a house to live in." The surviving brother testified that "Mary has had a slight increase in pay since my brother was killed." The father "kept some pocket money, $2 a week." Subject to this the earnings of the three wage earners, aggregating about $24, were given to the mother for the support of the family of six and the personal expenses of the five, not including Joseph, who was in the medical school and supported himself.

To find for the plaintiff the jury had to find that apart from the board and lodging of Joseph who was in the medical school, the parents were under all the circumstances dependent, in part at least, upon the son who was killed. There was no reason why the expense of Joseph's board and lodging should be charged wholly against the son rather than against the daughter who worked. We do not think that his presence in the family was fatal. Neither do we think the fact fatal that the family had since lived in the same house. It appeared that since then the daughter had had a slight increase of pay. But apart from that, having in mind the age and the lack of permanent employment of the father and the facts that for the short time which had elapsed since the death of the son the clothing probably had not had to be renewed, but would have to be renewed in the future, and that for the remaining family (except Joseph) all that there was left were the earnings of the father and the one daughter, we are of opinion that the jury were warranted in finding that the parents were dependent, at least in part, on the son who was killed; and that for these reasons the first ruling asked for was rightly refused. We do not find in the bill of exceptions the seventeenth ruling referred to in the defendant's brief.

Exceptions overruled.

EAST TENNESSEE TELEPHONE CO. v. CARMINE.

Kentucky Court of Appeals — May 22, 1906.

29 Ky. L. Rep. 479, 93 S. W. 903.

1. INJURY TO LINEMAN — NEGLIGENCE OF FOREMAN. — Plaintiff, a telep lineman, being directed by his foreman to remove an electric light received a shock. The foreman failed to warn the lineman that electric light company had changed its time for turning on the cu from five to four o'clock in the afternoon. *Held*, that the foreman guilty of negligence.
2. SAME — JOINT LIABILITY. — A telephone lineman injured by wires c electric light company using the same poles may sue both comp jointly.

Appeal by defendant, the East Tennessee Telephone Comp from a judgment in favor of plaintiff. *Affirmed.*

E. M. Dickson, for appellant.

McMillan & Talbott, Darnell & Stoll, and *Stoll & Bush,* appellee.

Opinion by HOBSON, C. J.:

Lafe Carmine was a lineman in the employ of the East ' nessee Telephone Company. It had a telephone pole about fc five feet high on one of the streets of Paris, Ky. On this p in addition to the telephone wires, were strung the wires of Paris Electric Light Company, which carried 1,100 volts of (tricity. Shortly after 4 o'clock in the afternoon of September 1902, Carmine was sent up the pole by his foreman to do s work, which he did. He was then directed by the foreman take up a wire of the electric light company, which was hang down, and had caused trouble to the telephone and telegraph w the night before. The electric light company had no power u its wires during the day. It had been turning the power on al 5 o'clock in the afternoon. A day or two before the trouble electric light company notified the telephone company that th after the power would be turned on about 4 o'clock. When (mine took hold of the wire that was hanging down the power not been turned on. While he was coiling it up to get it ou the way the power was turned on and he received a shock wl threw him to the ground and from which he sustained perma

injuries. He sued both the companies and recovered judgment against the telephone company for $1,500. From this judgment it appeals.

Carmine testified that he had no notice that the electric light power would be turned on before 5 o'clock and his statements as to what occurred between him and the foreman are confirmed by several other witnesses. The foreman testified that he told him to be careful, that the electric light power would soon be turned on and his statement is confirmed by other witnesses. The evidence is pretty evenly balanced, and we are not prepared to say that the jury were not warranted in accepting Carmine's version of what occurred. But waiving this, in view of the fact that it was after 4 o'clock and that the foreman knew that the electric light power was to be turned on about 4 o'clock, his own version of what he said to Carmine shows that he was guilty of gross negligence in the premises, for he should, knowing the danger, have explicitly warned Carmine and not left him in uncertainty as his own statement shows he did. He could not but know that there would be danger in handling this broken wire after the electric power was turned on, and he knew that it was liable to be turned on at any second. We cannot, therefore, disturb the verdict upon the facts. The plaintiff had a right to sue jointly the electric light company and the telephone company. *Cumberland Telephone Company v. Ware's Administrator,* 8 Am. Electl. Cas. 811, 115 Ky. 581, 74 S. W. 289.

The two defendants being sued jointly neither had a right to a separate trial. The allegations of the petition are sufficient to sustain the verdict. The plaintiff sufficiently avers that he had no notice that the current of electricity would be turned on. While the instructions of the court were more numerous than were necessary, they were on the whole favorable to the defendant.

Judgment affirmed.

MANGAN ET AL. v. HUDSON RIVER TELEPHONE COMPANY ET

New York Supreme Court, Special Term, Fulton County — May, 190

50 Misc. 388, 100 N. Y. Supp. 539.

1. GENERAL LIABILITY OF TELEPHONE COMPANY AND ELECTRIC LIGHT COM FOR INJURIES TO EMPLOYEE. — The personal representatives of an ployee of a telephone company, who was killed by contact with a wire alleged to have been caused by the negligence of a telephone pany and electric light company, may maintain an action against companies either jointly or severally.
2. SUFFICIENCY OF COMPLAINT — CONTRIBUTORY NEGLIGENCE. — The que of contributory negligence may be raised by demurrer to the compl and, although the complaint alleges generally that the plaintiff's i tate was free from carelessness, yet where it appears from the comp that the decedent was in the employ of one of the defendants, a telep company, and at the time of the accident was on a pole owned b electric railway company, not a party to the action which bore a belonging to the other defendant, an electric light company, having lation either inadequate or out of repair and that carried a curre high voltage and also a wire of the telephone company and in t ferring the telephone wire he untied the electric light wire fro insulator and when replacing it received a fatal shock; and where is no allegation that the electric light company had reason to know any one would interfere with its wires or that the wire could have rendered harmless by insulation, nor any allegation from which it be inferred that it was solely by reason of the defective insulation the intestate was killed, the complaint shows a want of reasonable caution on the part of the intestate; and a demurrer by the electric company on the ground that the complaint does not state facts suff to constitute a cause of action should be sustained.
3. INJURY TO LICENSEE. — The right of an employee of a telephone com to go upon a telephone pole to fix certain telephone wires does not i a license to interfere with an electric light wire on the same pole.
4. SAME — DUTY OF ELECTRIC LIGHT COMPANY. — An electric light com owes to a licensee or trespasser no active duty nor any duty to its wires properly insulated, and one standing in such relation to it be held to the exercise of reasonable care.
5. SAME — CARE REQUIRED BY LINEMEN. — A lineman employed in co tion with wires carrying electricity is bound to take active measur determine the condition of the insulating material of a wire carryi deadly current of electricity at the point of contact, before deliber and intentionally coming in contact with it.

Demurrer to complaint by the defendant lighting comp *Sustained.*

Liability of Electric Company for Injury to Employees. — See to *Shanks v. Citizens' General Electric Co.*, 8 Am. Electl. Cas. 640, 644.

Olmstead, Van Bergen & Canfield, for plaintiffs.

James O. Carr, for defendant illuminating company.

Opinion by SPENCER, J.:

Plaintiffs allege that their intestate was killed by reason of the concurrent negligence of the defendants. The defendant illuminating company demurs on three grounds: First, that two causes of action are improperly united; second, that there is a defect of parties defendant; and, third, the complaint does not state facts sufficient to constitute a cause of action against the demurrant.

The first ground of demurrer is held insufficient on the authority of *Lynch v. Elektron Mfg. Co.,* 94 App. Div. 408, 88 N. Y. Supp. 70. As to the second, there are no facts alleged which justify an inference that the railroad company mentioned in the complaint was in any respect negligent or owed any duty to the plaintiff's intestate or his employer. Moreover, a plaintiff is not required to make all joint tortfeasors parties defendant. He may prosecute his action against them jointly or severally. In respect to the third ground of demurrer, the sole contention is that the facts alleged show clearly that the plaintiff's intestate was not free from contributory negligence. While the plaintiffs need not specifically allege the absence of contributory negligence on the part of their intestate, it is necessary that they establish this fact upon the trial, its averment being involved in the averment that his death was caused by the negligence of the defendants. *Lee v. Troy Citizens' Gaslight Co.,* 98 N. Y. 115, 119.

In respect to this ground of demurrer, it may be said by way of preface that in the trial court contributory negligence is primarily a question of fact. It is only in rare and exceptional instances that it becomes a question of law. It is difficult to find an instance where it has been determined on demurrer. This is due to the complex character of the question. Sometimes it is a question of law, more often a question of fact, and frequently a mixed question of both law and fact. The lines of demarcation have not been clearly drawn and in many respects are still in doubt. There is, however, no reason why this question may not be determined on demurrer as well as after verdict. Certainly, in a well-drawn pleading, the facts should be more easily perceived than from the confused and sometimes incoherent testimony of witnesses. Yet

courts are every day reversing verdicts in negligence action the ground that the evidence shows that the injured persons guilty of contributory negligence, or have not shown thems free from such negligence.

We are called upon by the demurrer to construe the compl and determine what facts are alleged and what may be infe determine the degree of care the plaintiff's intestate should exercised under the circumstances, and determine whether intestate did or did not exercise such care. The first two questions of law. As to the last, if it is reasonably clear that intestate did not exercise such care, it is a question of law; if it is not clear, then it is a question of fact. If different m would reasonably arrive at different conclusions, the court sh regard the question as one for the jury. The demurrer ad all the facts alleged and all inferences which may be fairly dr therefrom. It does not, however, admit the inferences or clusions which the pleader has drawn from the facts.

The plaintiffs have alleged generally that their intestate free from carelessness, but in connection therewith they have forth the facts showing the manner by which he came to his de In this respect the complaint is full and explicit. We m therefore, regard the general allegation as an inference an no effect unless sustained by the facts. The demurrer goes only to the facts which appear, but also to those which do appear, because pleadings usually fail on this ground of demu by reason of omissions and not because of imperfect allegati It appears from the complaint that the plaintiff's intestate in the employ of the defendant telephone company and on a owned by an electric railroad company not a party to this act that near the top of the pole was a cross-arm supporting a belonging to demurrant, having inadequate insulation or ins tion which was out of repair and carrying a current of electri of 2,200 volts, dangerous to human life; that on said pole, s distance below the cross-arm, was a bracket carrying a wire of telephone company; that the work which the intestate was se do was to transfer the telephone wire belonging to his empl from its bracket to a cross-arm placed upon the pole at a p above demurrant's wire; that, for some reason not given, separated demurrant's wire from its cross-arm by untying it f

its pin and glass insulator; that afterward, and while engaged in retying and reattaching demurrant's wire to its pin and glass insulator, he received from it a shock of electricity which burned his hand and caused his death.

At this point we must note certain things which are not alleged and which may not be inferred from any allegations in the complaint, viz.: There is no allegation that demurrant knew, or had reason to know, that the intestate, or any other person not in its employ, would have occasion or necessity to interfere with its wire, or that the intestate so interfered with the demurrant's knowledge or consent. There is no allegation that a wire, charged as this was by a heavy current of electricity, could have been rendered harmless by any known insulation, nor is there any allegation that the plaintiff's intestate did not know of the insufficiency of the insulating material or that its defective character was not obvious. There is no allegation from which we can infer that it was solely by reason of the defective insulating material that the intestate was killed. The wires of both defendants were upon the same pole, supported by different cross-arms. They were thus brought into close proximity. From his situation it may be presumed that both defendants and their respective employees had the right to go upon the pole and perform such work in respect to their respective wires as might from time to time be necessary. But this right does not imply a license or permission from one defendant to the other to remove or in any manner interfere with one another's wires. If, however, an employee of one defendant, while engaged in his duties, came by inadvertence or accident into contact with the wire of the other and was thereby injured, he may not as a matter of law be said to be negligent. Whether he exercised due care or not would be a question of fact to be determined from all the circumstances. That is all that was held in *Illingsworth v. Boston Electric Light Co.*, 5 Am. Elect. Cas. 312, 161 Mass. 583, 37 N. E. 778, 25 L. R. A. 552, and *Perham v. Portland Electric Co.*, 7 Am. Electl. Cas. 487, 33 Or. 451, 53 Pac. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730.

As to demurrant, the plaintiff's intestate was upon the pole and engaged in work upon the demurrant's wire either as a licensee or trespasser. In either event demurrant owed him no active duty. *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 4 N. E. 752,

54 Am. Rep. 718. Each must be held to the exercise of reasonable care. Neither could rely upon the discharge of any active duty by the other. The plaintiff's intestate owed the duty to himself to exercise reasonable precaution. Did he exercise that care? I think the facts show that he did not.

Two causes of injury are alleged — one that the insulating material was inadequate, and the other that it was out of repair. As to the first, the fact is well known that wire employed for this purpose is a manufactured article bought and sold in the open market, and a person who uses it may not be regarded as negligent, unless it be alleged or proven that he knew or ought to have known its inadequacy. As to the question of repair, demurrant owed no duty to the intestate to keep its wire properly insulated at the place where he received his injury. *Hector v. Boston Electric Light Co.*, 7 Am. Electl. Cas. 568, 161 Mass. 558, 37 N. E. 773, 25 L. R. A. 554. But if it did, the intestate was still charged with the exercise of reasonable care. He was a man of mature age; he was employed in connection with wires carrying electricity. If he were injured because the insulating material was not intact, such defect was as apparent to him as to the demurrant. His point of contact must have been identical with the defective place in the covering. He came in touch with it not inadvertently or from necessity, but deliberately and intentionally. He, therefore, cannot establish his freedom from negligence, unless he had a right to speculate as to whether or not the covering was defective. Can it be said that a reasonably prudent person

wire was employed, the dangerous current conveyed by it, the liability of its covering becoming impaired by use and exposure or by coming in contact with hard substances, and the uncertainty of its effective operation occasioned by dampness or other causes beyond control, and therefore, as running his chances when he put himself in contact with it without taking any active measure to determine its actual condition.

I have not failed to observe what is said in *Perham v. Portland Electrical Co., supra.* What is said there on this subject does not in my judgment find support either in principle or precedent. The position there taken that the intestate had a right to assume that the insulation on both wires was in all respects intact and adequate and that, therefore, he had the right in reliance upon such assumption to bring them together and so form a short circuit through his person, was not necessary to the decision. He did not intentionally do an act of that kind. The further argument there advanced that "the danger was a hidden and secret one" flies in the face of common knowledge and experience, as also does the statement that inadequate insulation is deceptive. A more reasonable view of this subject is taken in *Hector v. Boston Electric Light Co., supra,* where the wires of both companies were supported by standards located upon roofs of neighboring buildings. The plaintiff, an employee of one company, had occasion in the performance of his duty to go upon the roof of the building supporting the wire of the other company and was accidentally injured because its insulating material had become worn. In considering the question of plaintiff's care, the court said:

"We doubt if the plaintiff offered sufficient evidence that he was in the exercise of due care at the time and place of the accident. It was daylight, the wires were visible, and the plaintiff knew that some of the wires might be dangerous. He unnecessarily stooped under some wires which he thought and knew might be dangerous, without noticing another set of wires lower down which were in plain sight. In consequence of this conduct his hand came in contact with one of the alternating electric light wires at a point where the insulation was worn off and he received his injury. If necessary to the decision, it would certainly deserve consideration whether this conduct does not show an unnecessary exposure to a danger which the plaintiff knew or ought to have known."

The plaintiffs cite *Dwyer v. Buffalo General Electric Co.,* 7 Am. Electl. Cas. 456, 20 App. Div. 124, 46 N. Y. Supp. 874, and

Paine v. Electric Illuminating & P. Co., 7 Am. Electl. Cas. 651, 64 App. Div. 477, 72 N. Y. Supp. 279. But these are not in point. In the Dwyer Case the bracket touched by the intestate was perfectly harmless, and the injured person had no reason to expect any danger by coming in contact with it. Owing, however, to the escape of the defendant's electricity, it became a deadly instrument. So in the Paine Case, the Western Union Telegraph wire upon which the deceased was working carried a harmless current, and, as it belonged to his employer, he had a right to assume that it would not otherwise be charged; but a deadly current escaped from the defendant's wire into it, thereby causing his death.

The allegations of the complaint will not, in my judgment, support a finding that the plaintiff's intestate was free from negligence. I am therefore of the opinion that the complaint does not state a cause of action against demurrant, and that the demurrer must be sustained, with right to the plaintiffs to plead over upon the usual terms.

Ordered accordingly.

CESSNA v. METROPOLITAN STREET RAILWAY CO.

Missouri — Kansas City Court of Appeals — June 4, 1906.

118 Mo. App. 659, 95 S. W. 277.

[redacted]

Boyle, Guthrie & Smith and *W. O. Cardwell,* for respondent.

Opinion by ELLISON, J.:

Plaintiff was engaged in defendant's employ as a carpenter, and while doing work for the latter received personal injury charged to have been caused by negligence. The judgment was for the plaintiff.

Defendant owned a power house and car barn in which there were ten or twelve tracks on which cars were run in. Over each of these tracks was a trolley wire running overhead. In working on a partition being constructed in the barn, it became necessary for plaintiff to go up on the top of a ladder some twelve or fifteen feet from the ground, and while there he came in contact with a water pipe on one side and charged trolley wire on the other, resulting in a shock which caused him to fall and receive serious injury. The negligence alleged and relied upon is in permitting the electric current in the wire without warning plaintiff. The defense was that plaintiff assumed the risk of the dangerous current being in the wire and of his coming in contact therewith, and also that he was guilty of contributory negligence. Among other uses to which the building was put was that of repair of trolley cars, and the wires were used in moving these cars in or out of the building, or from one place to another in the building. The electric current which furnished the power was admitted at the rear, and could, at any moment, have been easily cut off by throwing an electric switch provided for that purpose. There was no necessity for the current to be in the wires except when electric cars were in the barn, and at the time plaintiff was hurt there were no cars there.

On the question of plaintiff having assumed the risk of injury from the electric current in the wire, under the circumstances which the evidence in his behalf show to have existed at the time, we think there is little room for dispute; and we have no hesitation in holding that the demurrer to the evidence which defendant offered, so far as concerns that ground, was properly refused.

Nor do we see any reason for declaring, as a matter of law, that plaintiff was guilty of contributory negligence. We must consider the case from his standpoint; that is to say, we must consider as established fact all that the evidence in his behalf tends to show. From such standpoint plaintiff had no warning

that an electric current might be in the wire. Nor should it be held that the circumstances required him to assume that there was. The servant is not required to assume that the master will permit the presence of an unseen and unheard dangerous agency, when there is no use or purpose for such agency to serve; and though the servant may know that such agency could be present, but only through gross carelessness or neglect of the master, he is not required to assume such dereliction on the master's part. The cases cited in briefs of the respective counsel establish and illustrate the general rule applicable to cases of this nature. The cases of *Geismann v. Electric Co.,* 8 Am. Electl. Cas. 569, 173 Mo. 654, 73 S. W. 654, and *Winkelman v. Electric Light Co.,* 9 Am. Electl. Cas. 335, 110 Mo. App. 184, 85 S. W. 99, did not involve a question between master and servant, as does this case; but what is there stated serves to show the view of the courts in this State as to the hidden and dangerous agency of electricity carried from point to point on wires. So the cases of *Stevens v. United Gas & Electric Co.* (N. H. 1905), 9 Am. Electl. Cas. 338, 60 Atl. 848, 70 L. R. A. 119, *Alexander v. Light Co.,* 9 Am. Electl. Cas. 188, 209 Pa. 571, 58 Atl. 1068, 67 L. R. A. 475, and *Knowlton v. Des Moines Co.,* 8 Am. Electl. Cas. 800, 117 Iowa, 451, 90 N. W. 818, while not directly applicable to the particular facts of the present case, are helpful to an understanding of the nature of the care incumbent upon both the plaintiff and defendant.

There were many instructions given for defendant. We con-

step below, and as I took my hand off to lower myself, the wire swung either by the wind or the repair car coming down the road. The car got these wires vibrating and they struck me. I remember no more." There was evidence that the appellee's wires were not properly placed, and the wire which struck the appellant's hand as he descended the pole was not properly insulated.

The main question, presented by the exception to the prayer, is, were the facts and circumstances of the case so patent and plain as to have authorized the court in pronouncing them contributory negligence in law and in withdrawing the case from the consideration of the jury? The law controlling this class of cases has been settled by numerous decisions of this court. It is this, where the facts are undisputed or where but one reasonable inference can be drawn from them, the question is one of law for the court; but where the facts are left by the evidence in dispute or where fair minds might draw different conclusions, the case should go to the jury. The plaintiff in this case was in the exercise of a duty that required him to ascend and descend the distributing pole, and the appellee owed him a clear, legal duty to have its wires so placed and insulated as to permit him to perform this work in safety and without danger. In *Brown v. Edison Elec. Co.*, 7 Am. Electl. Cas. 576, 90 Md. 406, 45 Atl. 182, 46 L. R. A. 745, 78 Am. St. Rep. 442, it is said, as applied to the management by the appellee of its wires charged with high-tension current the legal duty would require it to see that its wires, when strung where persons were liable to come in contact with them, were properly placed with reference to the safety of such persons and were properly insulated. In the present case, the plaintiff ascended the pole to the cable box in safety and finished his work. In descending, his hands came into contact with a high-tension wire of the appellee, which he had passed in safety in going up, but which had become suddenly detached from the pole while he was making the descent. According to his evidence, "as I took my hands off to lower myself the wire swung, either by the wind, or a passing car, and it struck me." He became unconscious, and fell a distance of twenty to thirty feet, and was injured. The testimony in the case, also shows that the insulation of the high-tension wire, at the time of the accident, was defective, and this defect could not have been seen by the

Opinion by BRISCOE, J.:

This action was brought by the plaintiff to recover damages for personal injuries sustained by the alleged negligence of the defendant the United Electric Light & Power Company of Baltimore.

The declaration contains four counts. The first three charge negligence in the construction and maintenance of certain electric wires operated by the company in the town of Pikesville, near the Reisterstown road, in Baltimore county. The fourth charges negligence in permitting these wires to be and remain in a dangerous condition, exposed to contact with persons lawfully upon a telephone pole near its wires. The court below at the conclusion of the testimony on behalf of the plaintiff instructed the jury, that according to the undisputed evidence in the case, the plaintiff directly contributed by his own negligence to the injuries he received. The plaintiff excepted to the granting of this prayer, and the questions for our consideration are presented, on this exception and on rulings of the court, as to the admissibility of testimony, during the trial. At the time of the accident, the plaintiff was employed by the Maryland Telephone Company as a lineman to test the line and to answer what is known as "trouble calls" on the line. On July 31, 1902, he received a call and notice, to go to Pikesville to locate and ascertain "a trouble" on the line. When he reached the place of the accident he found it necessary in order to locate the trouble to ascend what is called "the distributing pole," with a cable box at the top. He ascended by means of iron spikes driven on the side of the pole, as steps, from the ground to the cable box, a distance of fifty feet. In going up he had to pass three electric wires of the appellee in close proximity to the pole, between the ground and the cable box. The first wire was about three inches from the pole; the second about twenty-five inches and the third about fifty inches. He ascended the pole without injury between the first and second wires and located the trouble at the cable box. In descending, his left hand came in contact with one of the wires, charged with 2,080 volts of electricity. He became unconscious and fell a distance of twenty feet to the ground, and was injured. He testified: "I was coming down. I had my left hand on the step and my right foot on the step. I was to lower myself to get on the

step below, and as I took my hand off to lower myself, the wire swung either by the wind or the repair car coming down the road. The car got these wires vibrating and they struck me. I remember no more." There was evidence that the appellee's wires were not properly placed, and the wire which struck the appellant's hand as he descended the pole was not properly insulated.

The main question, presented by the exception to the prayer, is, were the facts and circumstances of the case so patent and plain as to have authorized the court in pronouncing them contributory negligence in law and in withdrawing the case from the consideration of the jury? The law controlling this class of cases has been settled by numerous decisions of this court. It is this, where the facts are undisputed or where but one reasonable inference can be drawn from them, the question is one of law for the court; but where the facts are left by the evidence in dispute or where fair minds might draw different conclusions, the case should go to the jury. The plaintiff in this case was in the exercise of a duty that required him to ascend and descend the distributing pole, and the appellee owed him a clear, legal duty to have its wires so placed and insulated as to permit him to perform this work in safety and without danger. In *Brown v. Edison Elec. Co.*, 7 Am. Electl. Cas. 576, 90 Md. 406, 45 Atl. 182, 46 L. R. A. 745, 78 Am. St. Rep. 442, it is said, as applied to the management by the appellee of its wires charged with high-tension current the legal duty would require it to see that its wires, when strung where persons were liable to come in contact with them, were properly placed with reference to the safety of such persons and were properly insulated. In the present case, the plaintiff ascended the pole to the cable box in safety and finished his work. In descending, his hands came into contact with a high-tension wire of the appellee, which he had passed in safety in going up, but which had become suddenly detached from the pole while he was making the descent. According to his evidence, "as I took my hands off to lower myself the wire swung, either by the wind, or a passing car, and it struck me." He became unconscious, and fell a distance of twenty to thirty feet, and was injured. The testimony in the case, also shows that the insulation of the high-tension wire, at the time of the accident, was defective, and this defect could not have been seen by the

plaintiff as he ascended or descended the pole. According to the testimony on the part of the plaintiff, the injury would not have occurred if the wire of the appellee had been properly insulated or properly placed. We are of the opinion that the question of due care or negligence on the part of the plaintiff, under all the facts of the case, was one for the jury, and the court committed an error in withdrawing the case from its consideration, in granting the defendant's prayer, which said, that the appellant was, as a matter of law, guilty of contributory negligence.

The ruling on the first exception was correct. The change of the location of the wires after the accident could not affect the responsibility of the appellee at the date of the accident. *Columbia v. Hawthorne,* 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405; *Balto. & Yorktown v. Crowther,* 63 Md. 558, 1 Atl. 279; *Wood v. Heiges,* 83 Md. 271, 34 Atl. 872. There was no error in the rulings of the court, on the second, third, and fourth exceptions. They all relate to the refusal of the court to permit the witness Macodrom to testify as to the insulation of other wires than those in use by the appellee company. There was no proper foundation laid for the propounding of these questions and the court was correct in refusing to permit the witness to answer them. *Wood v. Heiges,* 83 Md. 271, 34 Atl. 872; *Crowther's Case,* 63 Md. 569, 1 Atl. 279; *B. & O. R. R. v. Thompson,* 10 Md. 76; *Electric Light Co. v. Lusby,* 9 Am. Electl. Cas. —, 100 Md. 634, 60 Atl. 248.

Being of opinion, the case was improperly withdrawn from the jury, by the granting of the defendant's prayer, as herein indicated, the judgment will be reversed, and a new trial awarded.

Judgment reversed, and a new trial awarded, with costs.

SNYDER v. NEW YORK & N. J. TELEPHONE CO.

New Jersey Court of Errors and Appeals — June 18, 1906.

73 N. J. L. 535, 64 Atl. 122.

1. INJURY TO TELEPHONE LINEMAN — DUTY TO WARN LINEMAN OF DANGEROUS ELECTRIC LIGHT CURRENT — QUESTION FOR JURY. — Plaintiff was employed by the defendant company to string some of its wires above and across certain electric light wires of another company. There was evidence, if believed, that the electric light wires did not usually carry any current, except at night, and that this fact was known to plaintiff. Shortly before plaintiff's injury the defendant company received notice from the electric light company that it would thereafter send through its wires in the daytime a current of dangerous intensity. Plaintiff testified that this fact was not communicated to him. *Held*, that there was a question for the jury whether the failure of the defendant company to give plaintiff notice was a breach of its duty to him.
2. SAME — OBVIOUS RISK. — There being evidence that the plaintiff had observed that the electric light wires did not customarily carry any current in the daytime, and further evidence that on Saturday plaintiff and

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Duty to Warn Employees of Danger. — It is the duty of the master, when a servant is set to work at a dangerous place, or with dangerous machinery or other appliances, to warn the servant of the danger to which he is exposed, where he knows or ought to know that the servant is not aware of the danger; and it is negligence on the part of the master to fail to give such warning in such a case. But where the servant knows the dangerous nature of the situation in which he is required to work, or of the machinery or other appliances which he is to use, such warning would not only be useless, but would be absurd. *Latimer v. General Electric Co.*, 81 S. Car. 374, 62 S. E. 438. As to the duty of a telegraph company to warn linemen of danger, see *Postal Telegraph Cable Co. v. Likes, ante*, 225 Ill. 249, 80 N. E. 136. As to construction of warning and notice of danger, see *Raker v. Toledo & Ind. Ry., ante*, 30 Ohio Circuit Ct. 78.

In the absence of an agreement or understanding that a signal would be given by an electric light company for the benefit and safety of telephone men, there was no duty to give such warning. *Rowe v. Taylorville Electric Co., ante*, 213 Ill. 318, 72 N. E. 711. In the case of *Williams v. North Wisconsin Lumber Co., ante*, 124 Wis. 328, 102 N. W. 589, it was held that whether the failure of a superintendent to warn a lineman before turning on the current constituted negligence was a question for the jury.

An owner of premises is bound to warn an employee of an independent contractor of electric wires near a staging upon which the employee is working. *Stevens v. United Gas & Electric Co., ante*, 73 N. H. 159, 60 Atl. 848.

The burden of proof is upon the plaintiff, in an action for death caused by contact with a live rail, to show that the defendant neglected its duty to instruct the decedent as to dangers. *Causulto v. Lenox Construction Co., post*, 122 App. Div. 672, 107 N. Y. Supp. 431.

See also, as to the master's duty to instruct employees, 8 Am. Electl. Cas. 639, 645, note.

others, to facilitate their raising the telephone wires, took down the electric light wires, and at the close of the day replaced them, finding no dangerous current passing, and that on Monday they manipulated some of the telephone wires, so as to justify an inference that they came in contact with the electric wires, without indicating any dangerous current therein, and that plaintiff, while working on the last of the telephone wires, received a serious injury from the current of electricity of intensity greater than that applied to telephone wires. *Held*, that there was a question for the jury whether the risk was an obvious one to the plaintiff, and that a nonsuit was erroneous.

(Syllabus by the Court.)

Error by plaintiff from judgment for defendant. *Reversed.*

Arthur S. Corbin and *John B. Humphreys,* for plaintiff in error.

Edward A. & William T. Day, for defendant in error.

Opinion by MAGIE, Ch.:

The judgment brought into review by this writ of error was entered upon a nonsuit directed by the learned justice of the Supreme Court, before whom the issue in the cause was tried. The plaintiff in error, who was the plaintiff below, attacks the judgment, claiming that there was evidence to go to the jury, and that it was erroneous to direct a nonsuit.

The record returned, and the bill of expections, disclose that the plaintiff in error was employed by the defendant company as a lineman. His action was brought to recover damages for an injury received by him, which he claimed was due to a neglect of the duty which the defendant company, as his employer, owed to him. Although the nonsuit was not directed on the ground that there was no proof of such liability on the part of the defendant, but on another ground, it is obvious that it is important to determine whether there was evidence to go to the jury on that subject, because if it be found that the trial justice erred in directing the nonsuit on the ground upon which he put it, it may still be that it should be sustained on the other ground. The conceded relation between Snyder and the defendant company was that of employer and employee. The company owed to him a duty to take reasonable care that the places in which it employed him to work were safe for the work which he was to do, and if unusual and unexpected perils respecting the places of work, or the work

itself, became known to the company, a duty was imposed on it to make such perils known to him. On this subject there was evidence to go to the jury. The plaintiff was employed by the company at the time his injury was received, in stringing telephone wires from pole to pole, over wires of the Paterson & Passaic Gas & Electric Light Company which ran at right angles to the line of wires which the plaintiff was stringing. There was evidence from which the jury could infer that the plaintiff, and other workmen in the employ of the company, had known that the wires of the Gas & Electric Light Co., were customarily charged with a current only at night, and that the current was used only for lighting the streets. There was evidence from which it could be found that some time before, the Gas & Electric Light Company, had formerly notified the defendant that it had established a day current along its lines in the locality in which plaintiff's injury was received, of considerable intensity, and the defendant company was asked to instruct its workmen to take proper precaution for their safety. The plaintiff testified that the fact that the Gas & Electric Light Company was to send day currents through its wires was not made known to him by the defendant company, nor was he warned of the danger he might incur by coming in contact with those wires, directly or indirectly after currents of the intensity stated were turned on, and carried through them in the daytime. In this respect there were questions for the jury. Upon the evidence, a verdict might have been rendered, finding the defendant company derelict in its duty to the plaintiff, its employee.

The learned justice, however, put his determination to withhold the case from the jury upon the sole ground that the evidence disclosed, as a matter of law, that the risk of injury which plaintiff took when accepting employment in stringing wires across the wires of an electric light company, was one obvious to him, and which, by acceptance of such employment, he assumed, and held that for injuries thus received, plaintiff could not hold his employer liable. In directing a nonsuit on this ground, I think there was error. The well-settled rule is that an instruction for a verdict, or a direction of a nonsuit, cannot be supported unless it appears that, upon facts which the jury might find to have been proved by the evidence, with such inferences as could be reason-

ably drawn therefrom, no verdict, and no number of verdicts could be supported. *Crue v. Caldwell,* 52 N. J. Law, 215, 19 Atl. 188; *Comben v. Bellville Stone Co.,* 59 N. J. Law, 226, 36 Atl. 473; *Newark Passenger Ry. Co. v. Block,* 4 Am. Electl. Cas. 523, 55 N. J. Law, 605, 27 Atl. 1067.

Plaintiff testified that he was an experienced lineman, and knew that an electric light wire became highly dangerous when a current of the intensity usually used for electric light or power is passing through it. Such wires, however, give no sign by their appearance, of the passing of a current, or of its intensity. If the only evidence produced showed that plaintiff had knowledge that he was stringing wires over the wires of an electric light company, which might be carrying a dangerous current, whether there was thus disclosed such an obvious risk assumed by plaintiff as would justify a nonsuit, or whether the question of assumption of risk on such evidence should be submitted to a jury, need not be determined. For there was other proof which, in my judgment, presented a question on the subject of assumption of risk which should have been submitted to the jury. It could have been found therefrom, that plaintiff, from previous observation, had ascertained that the electric light wires in that locality had not been used to carry any electric current in the daytime, and that plaintiff, with other linemen of the defendant company went to the place where the wires were to be strung crossing above the electric light wires, on Saturday, and were engaged during the day in that work. In the course of that day, and for the purpose of facilitating their work, they took down the electric light wires, and replaced them when they quit work on Saturday afternoon. The plaintiff declares that when he handled the electric light wires, in taking them down or putting them up he felt what he called a "little tickle," but it was evident that there was no dangerous current then passing through the electric light wires. On Monday morning, the gang of men, of whom plaintiff was one, returned to complete their work, and in doing so, had to rearrange some of the telephone wires, which had been left on Saturday pieced out by wires of a different size. They engaged in replacing those pieces by wires of the proper size, and proceeded so far as to complete their work in respect to two or three of the telephone wires. Plaintiff was then at the top of a pole, engaged

in putting what is called a sleeve, in the last wire that was to be strung, when, without warning, he received a shock which caused him to fall, and which terribly burned and maimed his hand. From this evidence the jury might find that, although an electric light wire, if carrying its intense current, was a danger which must have been known to the plaintiff, yet if they believed that on Saturday, plaintiff had assisted in taking down the electric light wires, and found no dangerous current in them, and on Monday he and his fellow workmen had strung some of their wires without experiencing any shock from the electric light wires, although the telephone wires, it may well be inferred, sagged down upon, and came in contact with them, I think there was a question for the jury, whether or not the danger of injury from a current through the electric light wires was, under those circumstances an obvious one, the risk of injury from which he must be deemed to have assumed.

The nonsuit cannot be sustained in my judgment on either ground, and the judgment must be reversed for a *venire de novo.*

KEELEY v. BOSTON ELEVATED RAILWAY CO.

Massachusetts Supreme Judicial Court — June 21, 1906.

192 Mass. 481, 78 N. E. 490.

1. THIRD RAIL — INJURY TO LABORER — EVIDENCE — DUE CARE — ASSUMPTION OF RISK. — In an action by a laborer against an elevated railway company to recover for personal injuries received as a result of striking a live third rail with a chisel, evidence considered, and *held*, that the jury were warranted in finding that the plaintiff was in the exercise of

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Injury to Laborers or Employees from Contact with Rail Charged with Electricity. — A servant employed to paint an elevated structure, knowing that it was dangerous to bring a metal swab in contact with an electrically charged third rail, assumed the risk of injury from such contact. *James v. Crawford*, 123 App. Div. 558, 108 N. Y. Supp. 142. Death of em ployee from contact with electric rail in subway, see *Causulto v. Lenox Construction Co., post*, 122 App. Div. 672, 107 N. Y. Supp. 431. As to injury of member of repair gang caused by iron shovel making a short circuit between a third rail and a bolt on a tie, see *Smith v. Manhattan Ry. Co., past*, 112 App. Div. 202. Injury from stepping upon electrically charged rail, see *Sullivan v. Brooklyn Heights R. R. Co., post*, 117 App. Div. 784, 102 N. Y. Supp. 982.

due care and that it cannot be said as a matter of law that the plaintiff assumed the risk.

2. SAME — NEGLIGENCE. — In an action to recover for personal injuries received by striking a charged third rail where it was shown that the third rail was supposed to be dead and that it was charged to allow the work train to pass over the northbound track, *held* that the defendant was negligent in turning on the power on the northbound track when the southbound track could have been used.

3. MASTER AND SERVANT — SAFE PLACE TO WORK — DELEGATION OF RESPONSIBILITY. — The general duty to provide a place for the plaintiff which was reasonably safe, having reference to the kind of business in which the defendant was engaged, was so far personal to himself as a master that he could not escape responsibility by delegating it to another.

4. SAME. — ASSUMPTION OF RISK — CONCEALED DANGERS. — A corporation operating an elevated railway is liable for failure either personally or through its servants, in providing against unnecessary or concealed dangers in places in which laborers are put to work. This is so although the laborers assume the obvious risk of the business.

Exceptions by defendant from verdict for plaintiff. *Overruled.*

Walter B. Grant, for plaintiff.

R. A. Sears, James F. Sweeney, and *Howard A. A. Wilson,* for defendant.

Opinion by LATHROP, J.:

This is an action of tort for personal injuries sustained by the plaintiff while in the employ of the defendant. The declaration contained several counts, some at common law, and some under Rev. Laws, 106, § 71. In the superior court the jury returned a verdict for the plaintiff on the second count, which alleged in substance that the plaintiff was set to work in a dangerous place, and while in the exercise of due care, and without being warned of the danger, was injured. At the close of the evidence the defendant asked the court to rule that upon all the evidence the plaintiff could not recover. The judge refused so to rule and submitted the case to the jury, under instructions which we must assume to be correct. The only exception is to the refusal to rule as requested.

The jury were warranted from the evidence in finding the folfowing facts:

The plaintiff employed by the defendant as a night laborer, was set at work as a member of a large gang of workmen, to assist in relaying about 500 feet of the defendant's north-bound track

on its elevated structure on Washington street, near Rollins street, Boston. While so employed, and when working near the third rail, so called, where he was directed to work, he was seriously injured by burns from a flash of electricity, caused by his chisel coming in contact with this rail, which at the time the defendant permitted to be alive.

The electric power used to operate the trains on the tracks ran through the third rail, and was generally turned off the rail between the morning hours of 1 o'clock and 5 o'clock, at which time the trains did not run, and the night gangs were at work on the tracks. The voltage used in the third rail was from 500 to 600 volts, and the amperage was very large; the burning effect is from the amperage; a person could be killed by a voltage of 500 volts. The electricity in the third rail could be turned on or shut off, from either or both tracks, entirely at the will or control of the defendant, by switches at the power stations at Sullivan Square or Atlantic avenue, or locally from either track by switches placed from 400 to 500 feet apart. The turning of the switches at Rollins street and at Castle street would have rendered the rail dead at the point of the accident, as it also could have been made dead from the power station. These local switches were under the control of the defendant's engineer, who testified that he knew of no reason for the use of the power on that night, between those streets.

It was also in evidence that an appliance termed a jumper was in common use at the time of the accident, by which the power could have been cut off from the rail for any assigned distance, even the length of a single rail, along the track, and the third rail made harmless; that the appliance used for this purpose could be handled by any one of ordinary intelligence. The defendant kept for use, when working near the third rail during the day, rubber blankets to throw over the rail, and the electricians at times used test lamps to ascertain whether the power was off or on. The workmen always had general instructions that the power was off while they were at work at night, and each morning about 5 o'clock one of the engineers would come around and state that the power was about to be turned on.

The defendant's engineer and foreman, having control of the power, had full knowledge that a large job was to be done that

night. Preparations were being made for some days before the work was done to replace about 500 feet of track; new rails had been brought to the place some days before and placed between the tracks, and in order to reduce the amount of work to be done on the night of relaying them the new rails had been assembled, that is, joined together in sections of three. To insure the completion of the work in one night, all three of the gangs, ordinarily employed in different places on the structure and in the subway, were consolidated and set to work together under the foreman of the plaintiff's gang.

It would have been an easy matter and a reasonable precaution to make the third rail dead along the whole distance which was undergoing repairs. This was the unanimous opinion of the defendant's engineers and managers. The defendant's chief operator received no orders that night to make the third rail dead. Telephones were in use between the various stations on the structure and to the power houses.

On the night the plaintiff incurred his injuries the men were instructed, when they went to work at 1 o'clock, that the third rail was dead. The defendant's records show that the third rails on both tracks were dead at 1:10 A. M. During the night instructions came from Sullivan square to the electrician in charge of that section where the work was going on, to open the switches at Castle street, which had the effect of putting the power on to the third rail for about half the length of the job. Some of the men were told in a general way that a portion of the rail was alive. The plaintiff was not so informed. The evidence was conflicting as to whether the foreman, Hellen, was so informed. The electrician placed a red lantern at the point of the dividing line between the live and dead rail, but the red lantern would indicate nothing to any one as to which side of the lantern the rail was alive and dangerous. The plaintiff did not see the lantern which, being at Rollins' street, must have been about 250 feet from the place of the accident.

The cause of turning on the power at Castle street was to let a work train go over the cross-over at Castle street to pick up some old rails on the south-bound track at Pelham street and Northampton street. It was not necessary that the power should have been turned on there for that purpose because, by using the south-

bound track through the subway, no occasion existed for any power to be applied to the third rail of the north-bound track. The chief operator at the power station testified that it would have been an easy matter to keep the rails dead, and that he received no orders to make them dead on that night.

At the time the plaintiff was injured he was assisting to remove a rail saw from one of the running rails within a few inches of the third rail, and in the performance of his work was directed by his foreman to strike a blow with a chisel (a long-bladed hammer) handed to him by the foreman for the purpose, the use of which necessitated his hitting the third rail. He asked the foreman if it was all right, and in response the foreman told him the rail was dead. The plaintiff had no knowledge of the manner of using the power in the third rail or as to the switches used for that purpose. He had no personal knowledge of whether the power was on the rail, or off, except that he was told it was off.

On these facts we can have no doubt that the jury were warranted in finding that the plaintiff was in the exercise of due care; and that it cannot be said, as matter of law, that the plaintiff assumed the risk. Nor can we have any doubt that the defendant was negligent in turning on the power on the north-bound track when the south-bound track could have been used for the running of the working train. The law applicable to this subject is well stated by Mr. Justice Knowlton in *Hopkins v. O'Leary,* 176 Mass. 258, 264, 57 N. E. 342, as follows: "The general duty to provide a place for the plaintiff which was reasonably safe, having reference to the kind of business in which the defendant was engaged, was so far personal to himself as a master that he could not escape responsibility by delegating it to another. *Toy v. United States Cartridge Co.,* 159 Mass. 313, 34 N. E. 461. While the plaintiff assumed the obvious risks of the business, he did not assume the risk from the failure of the defendant, either personally or through a superintendent, to perform the ordinary duties of an employer in providing against unnecessary or concealed dangers in places in which laborers were set to work. The jury were rightly permitted to pass upon the question whether the defendant was negligent in this particular. *Rogers v. Ludlow Mfg. Co.,* 144 Mass. 198, 205, 11 N. E. 77, 59 Am. Rep. 68; *Neveu v. Sears,* 155 Mass. 303, 29 N. E. 472; *O'Driscoll v.*

Faxon, 156 Mass. 527, 31 N. E. 685; *Coan v. Marlborough,* 164 Mass. 206, 41 N. E. 238; *Burgess v. Davis Sulphur Ore Co.,* 165 Mass. 71, 42 N. E. 501; *Dean v. Smith,* 169 Mass. 569, 48 N. E. 619."

This rule applies to corporations as well as to individuals. *Rogers v. Ludlow Mfg. Co.,* 144 Mass. 198, 201 *et seq.,* 11 N. E. 77, 59 Am. Rep. 68; *Toy v. United States Cartridge Co.,* 159 Mass. 313, 34 N. E. 461; *Burgess v. Davis Sulphur Ore Co.,* 165 Mass. 71, 42 N. E. 501.

While there was conflicting evidence on the question whether the foreman of the plaintiff's gang had been informed that the power had been turned on, the jury may have found that he had not been so informed. If so, and he supposed that the rail was dead, the order to the plaintiff was not a negligent one; and the negligence might well be found to be that of some one representing the company, to whom the defendant had intrusted the work, in allowing the power to be turned on to the third rail of the northbound track, and for whose negligence the defendant is liable.

Exceptions overruled.

DOLBEE v. DETROIT, Y., A. A. & J. RAILWAY CO.

Michigan Supreme Court — July 3, 1906.

144 Mich. 656, 108 N. W. 99.

ELECTRIC RAILWAYS — INJURY TO PASSENGER FROM ELECTRIC SHOCK — IN

in the construction of its railway, or cars, or their equipment, nor in the operation, conduct, and management of its cars and system. So far as the evidence goes nothing is shown but that the railroad company has fully performed its duty in these respects. If this accident was due to a shock of electricity, yet there has been no evidence as to what caused or occasioned it, there has been no evidence that the car or trolley wire or motive power was irregular or out of order, or that the propelling current of electricity was in any manner disarranged. If this accident was due to a shock of electricity it was incumbent upon the plaintiff to show the existence of this or that condition which might explain the accident, and to show that these conditions were due to the carelessness or negligence of the defendant railway company. This the plaintiff has failed to do. His inability so to do may be his great misfortune, but there is no remedy for it. So far as the evidence goes, if this accident was due to electricity, because of its escape or misdirection, or want of management of it, there is not a particle of light thrown upon that."

Before GRANT, BLAIR, MONTGOMERY, O'STRANDER, and HOOKER, JJ.

Lee N. Brown, for appellant.

Corliss, Leete & Joslyn, for appellee.

Opinion by GRANT, J.:

There is no evidence tending to show that a shock of electricity of 600 volts, the voltage in use upon this car, would produce any such injury as that which the plaintiff received. Neither is there any evidence tending to show that any voltage would produce that result. The theory of his original declaration is reasonable. If his arm had been out of the window and struck the pole, which was within reach, his injury is easily explained. Plaintiff introduced witnesses who were familiar with electricity and the construction and use of trolley cars. No one had ever known these two guard rods along the windows to become charged with electricity. The ends were screwed into the wood, and had no connection with any of the electric wires or apparatus. Plaintiff's own expert testimony showed that these rods could not be charged with electricity from the poles or from the trolley. No other similar accident was shown. No defect was shown in the construction or management of the car. On the contrary an immediate examination showed the car and its appliances to be in good condition, and nothing out of order. If the plaintiff's injury resulted from a shock of electricity, which is very doubtful, the

record fails to show any reasonable theory for it, or any negligence on the part of the defendant which caused it. Verdicts cannot be based upon mere conjecture or guess.

The judgment is affirmed.

HOOKER, J., concurred.

OSTRANDER, J. (concurring):

The first count of the amended declaration avers that plaintiff was injured because of his arm being in contact with a pole, charged with electricity, standing near the track and car. The second count avers the injury to have been caused "by a bolt of electricity falling off from or coming off from the feed wire or trolley wire and overhead electric appliances used in propelling the said car, * * * said bolt of electricity coming down the side of said car * * * and entered the plaintiff's body." In his opening to the jury, plaintiff's attorney said:

> "We will show it happened by a current of electricity coming down the side of the car and entering the body of the plaintiff. * * * We will show you that the poles were so close to the car, when in motion, it would be almost impossible for a car to run along; those poles being so close to the car as they are when in motion and the poles charged with electricity. We will show you that they are, and that the result was that in passing that pole he was shocked."

Plaintiff testified on cross-examination as follows: "Q. Did the pole come in contact with any part of your hand? A. No, sir; the pole came in contact with nothing." Again: "Q. Did you have your hand outside the car? A. No, sir; I did not." I agree in affirming the judgment upon the ground that the testimony for the plaintiff does not tend to prove that he was injured by electricity, and upon the further ground that the testimony did not tend to make a case within the averments of the declaration or the opening statement of counsel for the plaintiff. I am not clear that, under the circumstances disclosed, if the declaration had set out a case of injury by electricity and such injury was shown, plaintiff would be bound to account for the presence of the current of electricity in the car.

BLAIR and MONTGOMERY, JJ., concurred with OSTRANDER, J.

CITY OF EMPORIA v. WHITE.

Kansas Supreme Court — July 6, 1906.

74 Kan. 864, 86 Pac. 295.

NEGLIGENCE OF CITY IN LEAVING ELECTRIC WIRES IN STREET — INJURY TO TRAVELER. — A city is liable for injury to a traveler who without fault drove into an electric wire negligently left in the street by the city, although the traveler's horse had previously become frightened by a dog and was running away at the time of the accident.

Error by defendant from a denial of his motion for a new trial. *Affirmed.*

J. Harvey Frith, for plaintiff in error.

Kellogg & Madden and *Dennis Madden,* for defendant in error.

Opinion PER CURIAM:

Mary A. White recovered a judgment against the city of Emporia for personal injuries sustained by being thrown from her buggy while driving on one of its streets. She alleged that while driving along one of the streets in the city her horse came in contact with one of the city's electric wires which had become displaced and was on the ground; and that the horse became frightened and ran against a telephone pole throwing her out of the buggy. The court overruled the city's motion for a new trial on account of newly discovered evidence. This order the city now seeks to reverse.

The evidence introduced in support of the motion for a new trial was in the form of affidavits made by two young men who swore that they were present at the time Mrs. White was thrown from the buggy. The affidavits tend to establish three propositions: (1) That the horse driven by Mrs. White became frightened by a dog and was running away when it came in contact with the electric wire; (2) that the wire was not down on the street, but on a vacant lot; (3) that the wire was not down at 4 o'clock P. M. of the evening when Mrs. White received her injury. Whether the wire was down in the street and whether the city had actual notice of this fact, or whether it had been down a

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Liability of City for Negligence in Maintaining Electrical Appliances. — See note to *Davoust v. City of Alameda, ante.*

sufficient length of time to charge it with notice were disputed questions of fact on the trial, and both parties offered evidence tending to support their respective contentions. Therefore the affidavits relating to these questions were cumulative.

The only remaining question supported by the affidavits was that the horse driven by Mrs. White became frightened by a dog and was running away when it came in contact with the wire. If, without fault on the part of the plaintiff, her horse had been so frightened by a dog that it was beyond her control, and ran into an electric wire that the city had negligently permitted to lie on the ground, this would furnish no grounds for a new trial. If the city is guilty of negligence in permitting one of its electric wires to lie on the ground it is liable to a traveler who without fault of his comes in contact with it and sustains injury thereby. *Street Ry. Co. v. Stone,* 54 Kan. 83, 37 Pac. 1012; *City of Topeka v. Hempstead,* 58 Kan. 328, 49 Pac. 87.

The order denying the new trial is affirmed.

EATON v. CITY OF WEISER.

Idaho Supreme Court — July 6, 1906.

12 Idaho 544, 86 Pac. 541.

1. LIABILITY OF MUNICIPAL CORPORATIONS FOR CONDITION OF STREETS. — The doctrine announced in *Carson v. City of Genesee,* 74 Pac. 862, 9 Idaho, 244, holding cities and villages liable for negligence in the maintenance of their streets and thoroughfares in a reasonably safe condition for use by travelers in the usual modes, approved and followed.
2. LIABILITY FOR NEGLIGENCE IN OPERATING ELECTRIC LIGHTING SYSTEM. — Running and operating an electric light system by a municipality and the sale of electric light to private consumers is not one of its public and governmental powers and duties, but is rather a proprietary and private right and power, for the careless and negligent exercise of which the municipality will be held liable in damages the same as a private corporation or individual would be exercising the like rights.
3. SAME. — Municipal ownership, in the usual and common acceptation of that term, must of necessity carry with it the same duty, responsibility, and liability on account of negligence that is imposed upon and attaches to private owners of similar enterprises.
4. SAME — DEGREE OF CARE. — Where a city is maintaining a wire across one of its public thoroughfares for the purpose of carrying and distributing a powerful and dangerous force like electricity, it must be held to the duty of exercising such diligence and care in maintaining and using the

same as is commensurate with the dangers of the force which it is handling in order that it may avoid and prevent injury to those rightfully engaged in their various pursuits and employments.

5. SAME — EVIDENCE — CONTRIBUTORY NEGLIGENCE. — Evidence examined in this case and *held* that it does not establish such contributory negligence on the part of the plaintiff as to prevent and preclude him from recovering damages for the injuries sustained.

(Syllabus by the Court.)

Appeal by defendant from a judgment in favor of plaintiff and from an order denying motion for new trial. *Affirmed.*

Lot L. Feltham, for appellant.

Rhea & Son and *Edwin Snow,* for respondent.

Opinion by AILSHIE, J.:

The respondent obtained a judgment against the city of Weiser for $1,050, and costs, for personal injuries received by him on account of the negligence of the city in maintaining an electric light wire across one of the principal thoroughfares of Weiser. The city owns and is operating an electric light system for the purpose of lighting its streets and selling to the inhabitants of the municipality electric light. It appears that at about noon on the 7th day of March, 1904, a tree was felled by some one across one of the principal streets and struck the electric light wire which was stretched diagonally across the street. After the tree was removed the wire remained sagged about nine feet above the center of the street. It seems that this wire continued sagging until 5 or 6 o'clock that evening when it was less than eight feet from the ground. One of the employees who was a lineman, and who had charge of the repair of wires, was notified about 2 o'clock that afternoon; and, later in the afternoon, the foreman and general manager and superintendent of the system was also notified of the condition of the wire. Yet nothing appears to have been done toward repairing or raising the wire; and, as evening came on, a current of about 2,300 volts was turned on to the wire. During the evening of that day the travelers along that street, either on horseback or with team, appear to have been obliged to turn to one side or the other in order to avoid striking the wire; and one witness testifies that, in passing along about 5:45 in the evening, the wire struck him and he received a considerable shock from it. The plaintiff was a school boy some seventeen years

old, and at some time during the afternoon noticed that the wire was sagging across the street. That evening between 6 and 7 o'clock he was sent to town on an errand. He went on horseback, and it was a dark, rainy night. He says he went down another street and remained down town about three-quarters of an hour, and returned on the street over which this wire was stretched. He says:

"I started home up Main street, trotting a part of the way. I was in a hurry to get out of the rain, and I was coming back to Mrs. Daly's entertainment at the opera house. I had to take the horse back, and I had to dress up. There were lights as I went home; one by the opera house, there was one at the Monroe Creek bridge, one at Mr. Hass' house, and one at the Baptist Church, and there was one just below Mr. Sater's on Tenth street, about a block below Mr. Sater's. I did not notice any other lights in the streets at all. Something happened there by Mr. Sater's place. The last thing I remember was seeing Mr. Clayburgh sitting in his store talking to some one, and then I saw a flash and that was the last I remember. The next I remember is the next morning some of the folks came in there, and I woke up and asked them what was the matter with my hand. I do not remember of there being any obstruction in the street that night at all. I knew the wire was there, but I didn't know it was down."

No one saw the occurrence, but it is in evidence that the boy was badly injured from an electric shock, and it is also equally certain that he received it from this wire. The city contends, however, that he was guilty of such contributory negligence as to prevent a recovery, and predicates that contention principally upon the fact that the wire came in contact with his hand only. It is argued that if he had not been reaching for the wire that it would have necessarily struck his head or body, and that the very fact that it first came in contact with his hand is an evidence that he had extended his hand in the direction of the wire. We don't think this circumstance is sufficient to establish such contributory negligence as to prevent a recovery. There might be a great many explanations made as to why his hand was extended and struck the wire first; indeed, the wire might, as a matter of fact, have struck the body first, but not in such a way as to complete the electric circuit, and the plaintiff would have immediately attempted to remove it with his hand. Such action would have been almost involuntary. On the other hand, he might have seen the wire an instant before coming in contact with it, and have thrown up his hand to ward it off. In our view of the facts of

this case, however, it is unnecessary to speculate as to how this occurred.

The first contention made by appellant is that the city is not liable for personal injuries to individuals occasioned through the negligence of officers of the corporation to properly perform their duties. We had occasion to give this contention very careful consideration in the case of *Carson v. The City of Genesee,* 9 Idaho 244, 74 Pac. 862. In that case we held that: "Cities and villages incorporated under the general laws of Idaho, which grant to such municipal corporations exclusive control over their streets avenues, lanes, and alleys, are liable in damages for a negligent discharge of the duty of keeping such streets and alleys in a reasonably safe condition for use by travelers in the usual modes.' We are satisfied with the doctrine announced in that case and do not think it necessary to again go into a consideration of the reasons for such a rule. It has been followed by this court in *Moreton v. The Village of St. Anthony,* 9 Idaho, 532, 75 Pac. 262; *Village of Sand Point v. Doyle* (Idaho), 83 Pac. 598. In the case of *Moreton v. St. Anthony* we did say, however, "that a municipality is not guilty of negligence for every act or omission which would constitute negligence on the part of an individual. Much discretion is vested in such bodies." In the present case it is quite clearly established that the city did have ample and abundant notice of the condition of this wire. Notice to the employees of the city who had charge and control of its electric light system, and whose duty it was to keep it in order and to repair wires and

ıat term must of necessity carry with it the same duty, respon-
.ity, and liabilities that are imposed upon and attach to private
ers of similar enterprises. If the city owns and operates an
tric light system, and sells light to its inhabitants, there is no
on why it should not be held to the same responsibility for
.ries received on account of its negligent conduct of the busi-
as would a private individual be who might be running an
ɔsition plant in the same municipality and selling light to the
ens thereof. There is abundant authority to be found in the
ts in support of this position. As early as 1858 the Supreme
rt of Pennsylvania in *Western Savings Fund Society v. The
of Philadelphia,* 31 Pa. 183, 72 Am. Dec. 730, said:

"he supply of gas light is no more a duty of sovereignty than the supply
ater. Both these objects may be accomplished through the agency of
iduals or private corporations, and in very many instances they are
nplished by those means. If this power is granted to a borough or a
it is a special private franchise, made as well for the private emolument
advantage of the city as for the public good. The whole investment is
rivate property of the city, as much so as the lands and houses belong-
o it. Blending the two powers in one grant, does not destroy the clear
well-settled distinction, and the process of separation is not rendered im-
ble by the confusion. In separating them, regard must be had to the
t of the legislature in conferring them. If granted for public purposes
sively, they belong to the corporate body in its public, political, or mu-
al character. But if the grant was for purposes of private advantage
emolument, though the public may derive a common benefit therefrom,
orporation *quoad hoc* is to be regarded as a private company. It stands
e same footing as would any individual or body of persons, upon whom
ike special franchise had been conferred."

[r. Dillon, in volume 2 of his work on Municipal Corporations,
ection 594, says:

. municipal corporation owning waterworks or gas works which supply
ite consumers on the payment of tolls is liable for the negligence of its
ts and servants the same as like private proprietors would be."

.nd again at section 985 of the same work, in speaking of the
ility of a municipality "as a property owner," says:

Jpon similar grounds, municipal corporations are liable for the improper
agement and use of their property, to the same extent and in the same
ser as private corporations and natural persons."

n 1 Shearman & Redfield on Negligence, § 286, the authors
:

"In its proprietary or private character a municipal corporation may engage in enterprises for its own immediate profit or advantage as a corporation, although inuring ultimately, of course, to the benefit of the public. Of this character are waterworks, to supply water to consumers; or gas works, to supply gas, on payment of rates or tolls, and other similar enterprises. In respect of its liability for negligence in the construction and maintenance of such works, the corporation is on the same footing with private proprietors, and is liable for the negligence of its agents in the management of its business."

In *Aschoff v. City of Evansville* (Ind. App.), 72 N. E. 279, the Indiana Appellate Court entered into a somewhat extended discussion as to the distinction between those acts of municipal corporations that fall within and are necessarily performed under authority of the sovereign governmental or public power and duty devolving upon such corporations, and those acts and undertakings in which they engage in their private and business capacity. After pointing out many distinctions, the court arrives at the following conclusion:

"Where the water system is conducted by the municipality in part for profit, even if principally for public purposes, the municipality is liable for damages caused by its negligent management. *Chicago v. Selz, etc.*, 104 Ill. App. 376. And where it supplies water to its citizens, and charges therefor, it acts in its private capacity, although such waterworks system is also used for the extinguishment of fires. So acting, 'it stands on the same footing as would any individual or body of persons upon whom a like special franchise had been conferred.'"

One of the most carefully considered and tersely stated cases we have examined on this subject is that of *Esberg-Gunst Cigar Co. v. City of Portland* (Ore.), 55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651. After reviewing a number of authorities, the court said:

"In accordance with this distinction it is quite universally held that when a municipal corporation voluntarily undertakes to construct and maintain water or gas works in pursuance of statutory authority, for the purpose of supplying the inhabitants thereof with water or gas at the rates established by the city, it is liable for an injury in consequence of its acts in constructing and maintaining such works, the same as a private corporation or individual."

To the same effect as the foregoing authorities, see 2 Beach on Public Corporations, § 1140; Cooley on Const. Limitations, p. 249; 20 Am. & Eng. Enc. of Law (2d ed.), 1205; *Dunston v. City of New York* (Sup.), 86 N. Y. Supp. 562.

The city was using this wire across one of its public thorough-

fares for the purpose of carrying and distributing a most powerful and dangerous force, and one but poorly understood by the masses. Aside from its duty to maintain its streets in a reasonably safe condition, it was under a much greater duty as the owner and operator of a lighting system to exercise diligence and care commensurate with the dangers of the force it was handling in order to avoid and prevent injury to those rightfully engaged in their various pursuits and employments. *Perham v. Portland General Elec. Co.,* 7 Am. Electl. Cas. 487, 53 Pac. 14, 33 Ore. 451, 40 L. R. A. 799, 72 Am. St. Rep. 730; *Giraudi v. Elec. Imp. Co.,* 5 Am. Electl. Cas. 318, 107 Cal. 120, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114; *Denver Con. Elec. Co. v. Simpson,* 5 Am. Electl. Cas. 278, 21 Colo. 371, 41 Pac. 499, 31 L. R. A. 566; *Cook v. Wilmington City Elec. Co.,* 7 Am. Electl. Cas. 630, 32 Atl. 643, 9 Houst. (Del.), 306; *Macon v. Paducah St. R. Co.,* 7 Am. Electl. Cas. 630, 62 S. W. 496, 110 Ky. 680; *Economy Light Co. v. Stephens,* 58 N. E. 359, 187 Ill. 137; 15 Cyc. 471; *City of Denver v. Sherret,* 31 C. C. A. 499, 88 Fed. 226; Joyce's Electric Law, §§ 450 and 451; Croswell on Electricity, § 234. The plaintiff was a mere boy attending the public schools, and it would not be presumed that he was very familiar with electricity; and, in fact, it is not shown that he had any particular knowledge of its dangers more than would be possessed by any other boy of that age. He was traveling along the public highway where he had a right to be. He was not a servant or an employee of the defendant, and was chargeable with no duty to it other than that arising from his citizenship in the municipality That he was seriously and permanently injured is undoubted. Having notice, as the city had in this case, it was negligence to allow a live wire charged with a deadly current to remain suspended over a street in such manner that it was likely to come in contact with persons on horseback or in vehicles traveling along that thoroughfare. The evidence abundantly supports the verdict and judgment. We have examined the rulings complained of in the admission and rejection of evidence, and we do not think any error was committed in the rulings of the court in those respects.

The appellant complains of the action of the court in giving a number of instructions. Appellant urges that the instructions were in many instances conflicting and confusing, and that in one

instance they invaded the province of the jury as to matters of fact, and that the instruction on contributory negligence is erroneous and prejudicial to the appellant. It is unnecessary to repeat these instructions at length here or to deal with the objections made in detail. Our examination of them has failed to disclose any material inconsistency or any invasion of the province of the jury. The court does not appear to have expressed any opinion upon the facts. It is true that the instructions are given on the theory that the plaintiff had suffered an injury, and our examination of the record discloses to us that there was no dispute but that the plaintiff had received a serious injury; the only dispute on that point was as to the extent and gravity of the injuries received. That matter was properly submitted to the jury, and was evidently considered by them in fixing the amount of damages. Upon the objection that the court incorrectly stated the law of contributory negligence, we are satisfied no error was committed against the city. The instruction, if it varies at all from the true rule, is more favorable to the city than it was entitled to have given, and it has no cause for complaint against the instruction as it was given. A detailed consideration and discussion of the numerous rulings of the court and instructions given to which the appellant has taken exceptions would be of no particular value or importance here, and we therefore refrain from any further consideration of them in this opinion.

We find no error in the record that would justify the reversal of the judgment. The judgment is affirmed, with costs in favor

for the transmission of electricity for lighting purposes. Later the defendant, another electric lighting comporation, secured the same privileges from the city with the understanding that its poles and wires be placed in such manner and in such places as the city authorities should designate. Defendant erected three poles on a certain avenue which projected between and above plaintiff's wires in close proximity to three of plaintiff's poles upon which defendant strung its wires. Upon a bill being filed to restrain defendant from so erecting its poles and stringing its wires, it was *held* that the defendant having removed the danger by putting cross-arms upon its poles the bill should be dismissed, the location of the poles and wires being in accordance with the city regulations.

In equity.

Opinion by OVER (Orphans' Court Judge):

The plaintiffs by virtue of franchises granted to their predecessors in title maintain electric light wires on poles in Bessemer avenue, East Pittsburgh Borough, and the defendant by virtue of a franchise subsequently granted to it has erected three poles which project between and above the plaintiffs wires in close proximity to three of their poles on said avenue, to which the defendant has attached wires and is using them for the transmission of electricity for light purposes. After their erection the plaintiffs filed this bill praying·

First. That a preliminary injunction, hereafter to be made perpetual, might issue against the defendant restraining it from erecting its poles and stringing its wires in such close proximity to the poles and wires of the plaintiffs as to interfere with the transmission of electric current by the plaintiffs;

Second. That the defendant be required and directed to forthwith change its poles and wires now erected and strung so that the said poles and wires of defendant shall be at such a distance from those of your orators as not to endanger the property of your orators and the lives and property of its employees and patrons and of the public generally; and

Third. For general equitable relief.

Upon hearing on the application for a preliminary injunction the court made an order directing the defendant, until final hearing, to place cross-arms on the poles erected by it, and to attach to them the plaintiffs' wires, so that there shall be a clearance of at least twelve inches between the poles of defendant and plaintiffs' wires and enjoining the defendant from erecting other poles within twenty-four inches of the plaintiffs' wires.

Although in the bill there is no specific prayer for the removal of defendant's poles from the side of Bessemer avenue upon which the plaintiffs' poles are located, yet the plaintiffs now claim that the defendant should remove them. It is not contended that the plaintiffs have the exclusive right to erect poles and wires on Bessemer avenue for the transmission of electric current; but plaintiffs claim, and a number of witnesses testified, that it is not a safe construction to have the poles of one electric light company extend through the wires of another. The principal objections as stated by the witnesses are the danger to employees going up between the wires, and the liability of the wires to swing out against the poles, when, if the voltage is high enough, it will burn either the wire off, or the pole off. The last objection has been removed in this case by the defendant's compliance with the decree of the court directing it to attach plaintiffs' wires to cross-arms placed on defendant's poles. As the defendant's wires are above the plaintiffs, it is the former's employees who run the risk of passing between the wires and not the plaintiffs, and the risk is no greater than if the plaintiffs had an additional cross-arm on its poles and wires attached thereto.

It is contended also by plaintiffs that the defendant could avoid all interference with their poles and wires by erecting its poles on Bryan alley. To do this, however, the defendant's wires would have to cross plaintiffs' wires and those of two telephone systems, and more disastrous results are likely to follow by the contact of an electric light and telephone wire than that of two

defendant has the right to maintain them; Joyce on Electric Law, § 517. But in maintaining them every precaution should be taken not to interfere with or injure plaintiffs' lines, and as they are operating under a prior license the preliminary decree heretofore made directing the attaching of the wires to cross-arms on the defendant's poles and regulating their erection is reasonable and must be made perpetual.

The defendant alleges in its answer filed after the preliminary decree, that it "offered to protect plaintiffs wires by attaching them to cross-arms or allow them to do so, but was prevented by plaintiffs' action," and if this be the fact the plaintiffs should pay the costs. If the answer is responsive to the bill there is no evidence to overcome it and the facts would be found to be as stated therein; but the affidavit to the answer is made by the superintendent of the defendant company, who says therein "that the averments set forth in the foregoing answer are true and correct as he verily believes," and as he does not aver that he has personal knowledge of the alleged facts, the answer is merely part of the pleadings in the case and is not evidence. *Kane v. Fire Insurance Company* (No. 1), 199 Pa. 198.

The only evidence on the subject is that of an officer of the defendant company who testified it never objected to plaintiffs fastening their wires to defendant's poles, and one of plaintiffs' witnesses who testified on cross examination that the matter might have been talked about. This eveidence is not sufficient to sustain the averments in the answer and the costs must be placed on the defendant.

Findings of fact.

1. The plaintiffs and defendant are corporations organized and existing under the laws of the commonwealth of Pennsylvania for the purposes of manufacturing and supplying electric current to the public in certain portions of Allegheny county, including the borough of East Pittsburgh.

2. The plaintiffs by virtue of an ordinance of said borough passed April 30, 1896, and their succession to the rights of the licensee therein named, are maintaining on Bessemer avenue in said borough poles and seven lines of wires attached thereto for the transmission of electricity for lighting purposes, four of said lines carrying 5,000 volts each, one 3,600 and two 1,100.

3. The councils of said borough on the 12th of February, 1906, passed an ordinance granting to the defendant company the right to erect poles along the streets of said borough and attach wires thereto for the transmission of electricity for light and other purposes, the company to "place the poles and other appliances along the streets and highways in such manner and location as the street committee or the borough engineer of the borough shall designate."

4. About May 1, 1906, the defendant erected three poles on Bessemer avenue, East Pittsburgh, between South Park street and Grandview avenue, on the same side of Bessemer avenue as the pole line and wires of the plaintiffs, in such manner that the poles of defendant pass between and extended above the wires of plaintiffs, and strung wires on these poles; and the defendant's poles were erected in close proximity to two poles of the plaintiffs, one of them being so close as to almost touch the pole of plaintiffs. These poles were erected in the locations designated by the engineer of said borough and when erected were within a few inches of plaintiffs high tension wires; but these wires are now attached to cross-arms on defendant's poles as required by the preliminary decree.

5. The defendant having attached plaintiffs' wires to cross-arms on the defendant's poles there is now no substantial invasion of the plaintiffs' rights under their prior license, and the maintenance by the defendant of its poles and wires does not interfere with the right of the plaintiffs to properly maintain and operate their lines and transact their business.

Conclusions of law.

The plaintiffs do not have the exclusive right to erect and maintain poles and wires on Bessemer avenue, East Pittsburgh, and the defendant under the ordinance of said borough had the right to erect and maintain the poles and wires erected and constructed by it on said avenue; but every precaution should be taken by the defendant to prevent injury to the plaintiffs' poles and wires, and the preliminary decree made in this case must be made perpetual. The costs to be paid by the defendant.

Let a decree be drawn accordingly.

AIKEN v. CITY OF COLUMBUS.

Indiana Supreme Court — Oct. 2, 1906.

167 Ind. 139, 78 N. E. 657.

1. LIABILITY OF CITY OPERATING ELECTRIC LIGHTING SYSTEM. — A city or town is answerable *ex delicto* for any direct invasion of the rights of third persons in the management of its public lighting system. Thus, it is liable for injuries resulting from contact with a live wire in the street.
2. SAME — SUFFICIENCY OF COMPLAINT. — In an action for death caused by coming in contact with a live electric light wire in the street, a complaint alleging that the fall of the wire was the proximate cause of the death and that said wire had become weak and rotten, is insufficient where it is not alleged that the wire fell by reason of such defective condition.

Appeal by plaintiff from a judgment for defendant, after sustaining a demurrer to the complaint. *Affirmed.*

John W. Morgan and *W. W. Lambert,* for appellant.

Francis T. Hood, James F. Cox, Charles S. Baker, W. H. Everroad, C. B. Cooper, and *C. J. Kollmeyer,* for appellee.

Opinion by GILLETT, J.:

By appellant's complaint in this action appellee was sought to be charged with negligence in the management of its public lighting system, whereby appellant's intestate was killed, on his own premises, by coming in contact with a live wire, belonging to appellee, which had fallen from its electric light pole in the adjoining street. A demurrer was sustained to the complaint, and, from the judgment which followed, appellant appeals.

It is contended by counsel for appellee that, as it does not appear that the city made any use of said system other than for the purpose of lighting its streets, it was acting in a governmental capacity, and is therefore not to be held liable for the negligence of its employees and servants in the management of the property. Municipal corporations proper, as cities and towns, do not enjoy as extended immunity from liability *ex delicto* as do public *quasi* corporations, which are mere subdivisions of the State, organized for the purpose of administering the local affairs of government.

Liability of City Operating Electric Lighting System. — See *Davoust v. City of Alameda, ante,* and note thereunder.

As it is possible, however, to devolve upon cities and towns duties which they administer solely for the public good, it follows that, with respect to such duties, they are regarded as acting on behalf of the State, and not in their private or corporate capacity. Speaking in general terms, it may be said that the duties which municipalities perform with respect to the public health, charities, and schools, in the protection of property against fire and in the maintenance of the peace, are ordinarily regarded as performed as representatives of the general public, and in such cases cities and towns enjoy the same immunity from action *ex delicto* as does the State. We may at once put aside, as not involved in this case, all question concerning the nonliability of municipal corporations for their acts or omissions in respect to legislative, discretionary, and *quasi*-judicial powers. The omission in question involves the failure to perform a ministerial act, and, if it was a corporate duty, the municipality was guilty of a tort. It was said by CAMPBELL, J., in *Sheldon v. Kalamazoo,* 24 Mich. 383, 385:

"The doctrine is entirely untenable that there can be no municipal liability for unlawful acts done by municipal authorities to the prejudice of private parties. In this respect, public corporations are as distinctly legal persons as private corporations. When the act done is in law a corporate act, there is no ground upon reason or authority for holding that if there is any legal liability at all arising out of it, the corporation may not be answerable. There is no conflict whatever in the authorities on this head."

Judge DILLON, who has been at considerable pains to cast into doctrine the decisions of the courts relative to municipal responsibility for tort, says:

"As respects municipal corporations proper, whether specially chartered or voluntarily organized under general acts of the character before alluded to, it is, we think, universally considered, even in the absence of a statute giving the action, that they are liable for acts of misfeasance positively injurious to individuals, done by their authorized agents or officers, in the course of the performance of corporate powers constitutionally conferred, or in the execution of corporate duties, and it is the almost, but not quite, uniform doctrine of the courts that they are also liable where the wrong resulting in an injury to others consists in a mere neglect or omission to perform an absolute and perfect (as distinguished from a legislative, discretionary, *quasi*-judicial, or imperfect) corporate duty, owing by the corporation to the plaintiff, or in the performance of which he is specially interested." 2 Mun. Corp., § 966.

As far back as *Ross v. City of Madison,* 1 Ind. 281, 48 Am. Dec. 361, this court declared that "it may also be considered as

settled that municipal corporations are responsible, to the same extent, and in the same manner, as natural persons, for injuries occasioned by the negligence or unskilfulness of their agents in the construction of works for the benefit of the cities and towns under their government." In four instances their declaration of the law has been approved by this court. *City of Logansport v. Wright,* 25 Ind. 512, 515; *Stackhouse v. City of Lafayette,* 26 Ind. 17, 22, 89 Am. Dec. 450; *Roll v. City of Indianapolis,* 52 Ind. 547, 549; *City of Greencastle v. Martin,* 74 Ind. 449, 452, 39 Am. Rep. 93. As was tersely stated in *Jones v. City of New Haven,* 34 Conn. 1: "Where judicial duty ends and ministerial duty begins, there immunity ceases and liability attaches." Counsel for appellee concedes that if the wire had fallen in a public street, and the city knew, or ought to have known, of its defective condition, appellee would have been guilty of negligence in failing to keep the street safe, but it is to be remembered that the duty of a city or town in respect to the public ways therein grows out of the exclusive power which the municipality possesses over such ways coupled with the power of taxation for general purposes. *Grove v. City of Fort Wayne,* 45 Ind. 429, 15 Am. Rep. 262; *Yeager v. Tippecanoe Township,* 81 Ind. 46; Elliott, Roads and Streets, § 611. If the city would be liable for the omission of a duty in the case mentioned, *a fortiori,* ought it to be liable in a case involving the elements of a trespass?

There is really but one question in this case, and that is, was the omission a corporate dereliction, or was appellee's act in providing a public lighting system a governmental undertaking? In the determination of this question it is proper to consider the manner in which the power was conferred, the obligations which naturally flow from proprietorship, and the purpose for which the power was granted and exercised. The city was under no obligation to light its streets. It enjoyed that authority, but the exercise of the power was wholly a matter of its own volition. Section 4301, Burns' Ann. St. 1901; *City of Indianapolis v. Scott,* 72 Ind. 196; Tiedeman, Mun. Corps., § 344a, and cases cited. As neither the letter nor the implications of the statute has made the lighting of streets a governmental duty, and as the city derives a benefit in its corporate capacity, as well as a local benefit, from the exercise of the power, the fact that it was

voluntarily exercised is an important circumstance. The proposition finds illustration in a number of cases where the benefits might be said to be in a degree public, but where there was nevertheless room for the supposition that the local advantage to the corporation or its inhabitants was a moving consideration in the voluntary assumption of the power. Thus, in *Riddle v. Proprietors of Locks & Canals,* 7 Mass. 169, 187, 5 Am. Dec. 35, PARSONS, C. J., in pronouncing the opinion of the court says that it is one of the maxims of the common law "that a man specially injured by the breach of duty in another shall have his remedy by action. If the breach of duty be by an individual, there is no question; and why should a corporation, receiving its corporate powers and obligated by its corporate duties with its own consent, be an exception where it has, or must be supposed to have, an equivalent for its consent?" It was held, in *Oliver v. City of Worcester,* 102 Mass. 489, 499, 3 Am. Rep. 485, that the city was liable for a defect in a path in the public common. GRAY, J., in that case said that cities may be liable "for acts done in what may be called their private character, in the management of property voluntarily held by them for their own immediate profit or advantage, although inuring, of course, ultimately to the benefit of the public." In *Jones v. City of New Haven,* 34 Conn. 1, the city was held liable for the failure to remove a decayed limb of a tree in the public square, whereby a person was injured, the corporation having properly taken upon itself the duty of caring for the trees. We shall not dwell at length upon the obligations of proprietorship. Where a city has seen fit to acquire title to property in the management of which it is without let or restriction it would seem peculiarly just, at least where the property in part serves some municipal purpose, that there should be devolved upon the municipality that fundamental obligation of ownership which finds expression in the maxim, "*sic utere tuo ut alienum non lædas.*" As said by Mr. Justice FIELD, in *Baltimore, etc., R. Co. v. Fifth Baptist Church,* 108 U. S. 331, 2 Sup. Ct. 728, 27 L. Ed. 739: "grants of privileges to corporate bodies confer no license to use them in disregard of the private rights of other persons. The great principles of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others', forbids other application

or use of the rights and powers conferred." It is perhaps as much upon the ground of proprietorship as any other that it was held in *Twist v. Rochester* (Sup.), 55 N. Y. Supp. 850, affirmed in 165 N. Y. 619, 59 N. E. 1131, that a city was liable for permitting a parol wire, heavily charged with electricity, to fall and remain in a public street. See, also, *Eastman v. Meredith,* 36 N. H. 284, 72 Am. Dec. 302; *Thayer v. Boston,* 19 Pick. (Mass.), 511, 31 Am. Dec. 157. We may, in this connection, mention that, in *City of Greencastle v. Martin,* 74 Ind. 445, 39 Am. Rep. 93, it was held that the city was properly charged with negligence in the management of its pound, although the ordinance providing for the impounding of animals was an exercise of the police powers. It was decided in *City of Lafayette v. Allen,* 81 Ind. 166, that the complaint therein, which was by a person who had been employed as engineer of the waterworks of the municipality, for injuries received by the explosion of the boiler used in pumping water into the city water pipes, stated a cause of action, although it is to be noted that there was no allegation in the complaint that the city derived a profit from the sale of water.

Coming to the purpose for which the power to erect an electric light plant was granted, it must be admitted that public lighting serves a governmental purpose, at least in an incidental way, in that it is a check upon crime and immorality, but the element of local convenience to the inhabitants and the extent to which such lights protect the municipal treasury against damage suits, because of streets which have become temporarily or permanently unsafe, affords a very clear basis for the assertion that such lights are a municipal utility. The fact that a city or town, pursuant to statute, voluntarily constructs and maintains a work from which it derives a revenue has frequently been referred to as one of the markings of a municipal undertaking. No case, however, has come to our notice in which this element has been held essential to liability, but there are many authorities that either directly or in effect uphold the opposite view. *Twist v. City of Rochester, supra; Missano v. Mayor,* 160 N. Y. 123, 54 N. E. 744; *Jones v. City of New Haven,* 34 Conn. 1; *Barney Dumping Boat Co. v. Mayor* (C. C.), 40 Fed. 50; *Eastman v. Meredith, supra; Thayer v. Boston, supra; Oliver v. City of Worcester,* 102 Mass. 489, 499, 3 Am. Rep. 485; *Dickinson v. City of Boston,* 188 Mass. 595, 75

N. E. 68, 1 L. R. A. (N. S.) 664; *Wagner v. City of Portland*, 40 Ore. 389, 60 Pac. 985, 67 Pac. 300; Webb's Pollock on Torts, 69; Jones, Neg. Mun. Corps., § 150; Williams, Neg. Mun. Corps., § 31. At least as to property voluntarily held, if the exercise of the power confers a benefit upon the people of the community in their local capacity, or if it is a means to the attainment of some municipal end, we are of opinion that the corporation is held to the exercise of due care concerning such property. The blending of the powers of local sovereignty and corporate capacity in one does not destroy the clear and well-settled distinction which the cases maintain, nor does the confusion render the process of separation impossible. *Western Savings Fund Soc. v. Philadelphia*, 31 Pa. 175, 72 Am. Dec. 730; *Bailey v. Mayor*, 3 Hill (N. Y.), 531, 38 Am. Dec. 669. In the case last cited, which is a leading one upon the general subject under discussion, the question was involved as to the liability of the city of New York for the negligent construction of a dam by its water commissioners. A point of difficulty was presented, in that such commissioners were designated by the Legislature, but the city had accepted the benefit of the act. In response to the argument that the undertaking was governmental in its character, NELSON, C. J., said:

"The argument of the defendant's counsel confounds the powers in question with those belonging to the defendants in their character as a municipal or public body — such as are granted exclusively for public purposes to counties, cities, towns, and villages, where the corporations have, if I may so speak, no private estate or interest in the grant. As the powers in question have been conferred upon one of these public corporations, thus blending in a measure those conferred for private advantage and emolument with those already possessed for public purposes, there is some difficulty, I admit, in separating them in the mind, and properly distinguishing the one class from the other, so as to distribute the responsibility attaching to the exercise of each. But the distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage or emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company."

In *Barney Dumping Boat Co. v. Mayor, supra*, the question arose as to the liability of the city of New York for the negligence of persons in charge of a tug used by the city in connection with

the cleaning of its streets. Judge WALLACE, in referring to the duties of the street commissioner, said:

"His duties, unlike those of the officers of the departments of health, charities, fire, and police, although performed incidentally in the interest of the public health, are more immediately performed in the interest of the corporation itself, which is charged with the obligation of maintaining its streets in fit and suitable condition for the use of those who resort to them."

Following the last-cited case it was held, in *Missano v. Mayor,* 160 N. Y. 123, 54 N. E. 744, that the city was liable for the negligence of the driver of an ash car who was employed in the street cleaning department. A case which is precisely like this in principle is *Dickinson v. City of Boston,* 188 Mass. 595, 75 N. E. 68, 1 L. R. A. (N. S.) 664. In that case the city had by ordinance established what it termed a lamp department, that included the lamps and other property used by the municipality in its system of street lighting, and the management of the department had been intrusted to an officer. This was done under a statute which authorized, but did not require, the city to maintain lamps to light its streets. An action was brought to recover for injuries received by the plaintiff's intestate, while on her own premises, owing to the fall of a defective lamp-post which stood in the public way. Answering the objection that the officer in charge of the department was a public officer for whose negligence the city was not responsible, the court said:

"In suits for damages caused by defects in streets, which at night may become dangerous to travelers because they are dark and unlighted, it uniformly has been held that, as a city or town is under no statutory requirement to light them, an omission to do so does not constitute negligence. *Sparhawk v. Salem,* 1 Allen (Mass.) 30, 32, 79 Am. Dec. 700; *Randall v. Eastern Railroad Co.,* 106 Mass. 276, 8 Am. Rep. 327; *Lyon v. Cambridge,* 136 Mass. 419; *Spillane v. Fitchburg,* 177 Mass. 87, 88, 58 N. E. 176, 83 Am. St. Rep. 262. But if, under no obligation imposed by statute, the defendant undertook this service for the general convenience of its citizens, and travelers within its borders, it also by so doing derived an incidental benefit by the protection thus afforded of decreasing the probability of suits against it for defective public ways, under Rev. Laws, c. 51, §§ 1, 18. An unlighted public way, indeed, may be dangerous when used at night, though not thereby rendered defective. If, however, it is out of repair, and this condition has been undiscovered or, if discovered, not remedied, the probability that travelers using it would be less likely to be injured when lighted than if unlighted is apparent and appreciable. It was unnecessary for the plaintiff to show that any direct commercial profit had been derived. The indirect benefit thus conferred supplied a sufficient motive for the defendant's action. Having voluntarily undertaken

the enterprise for its private benefit, and not acting in the performance of a public duty, it is liable for negligence in the management of its corporat property, when used for such purpose. * * * If the defendant lighted i streets as a matter of convenience and safety for those having occasion t use them at night, without being required by law to undertake the performan of such a duty, the superintendent of lamps for this purpose became its se vant, for whose negligent conduct in their maintenance it was responsible."

We are satisfied that we are within the authorities in holding as we do, that a city or town is answerable *ex delicto,* for an direct invasion of the rights of third persons in the managemen of its public lighting system. While the doctrine of immunity of municipal corporations in matters purely governmental is too well established upon the authorities to be shaken, yet we are of opinion that public policy requires that the doctrine should be kept strictly within limits, to the end that, so far as possible, corporate liability may prompt those charged with responsibility in the government of cities and towns to be alert to prevent wrongs to third persons in the maintenance of municipal property. The point is made, however, that although it appears that the fall of the wire was the proximate cause of the death of appellant's intestate, and that said wire had become weak and rotten, in which respect appellee is charged with negligence, yet it is not alleged that the wire fell by reason of such defective condition. Although it is clear from a reading of the complaint that this was an assumed fact, yet the omission of the allegation renders the complaint insufficient, and an affirmance must follow.

In passing, as we have, upon the substantial question in this

tions, or controversies relative to rights in actions which may subsequently be brought, but in this case, finding that the main question is the threshold one, that it is the only one, which admits of serious disagreement, and that the complaint is so framed as to show that it was the purpose to charge that the wire fell by reason of the defect, so that it is clear that the missing averment will be supplied — we conceive that our duty is not done in disposing of the case solely on said point and compelling appellant to wait the time necessary to dispose of a second appeal, when to decide the real question now, in its order, in the light of full discussion, would be at once to correct the court below in what was evidently its misconception of the law of the case, to the end that in this controversy justice may be administered, to borrow from the sounding phases of the Constitution, completely and without denial, speedily and without delay. The general authority to review and revise necessarily includes the right to enforce the law and to administer justice, and the court upon an investigation of the record, may so frame its judgment as to prevent the defeat of justice by technical and arbitrary rules. It is a rule, which is also applicable to appellate tribunals, that, if a court acquires jurisdiction for one purpose, it will retain it for all, and "our code means that this court shall decide upon the substantial merits of a controversy where it can properly be done." *Feder v. Field,* 117 Ind. 386, 20 N. E. 129; Elliott's App. Proc., § 18. Many cases are to be found in the books in which the courts of appellate jurisdiction, in affirming judgments, have, in order to protect the evident equities of one of the parties, added some restrictive provision, or added to the judgment of affirmance an order remanding the cause, to the court below either for the purpose of amending the declaration or the plea, or for some other action to be taken in the trial court. *Fidelity, etc., Ins. Co. v. McClain,* 178 U. S. 113, 20 Sup. Ct. 774, 44 L. Ed. 998; *Matter of Ingraham,* 64 N. Y. 310; *Piper v. Hoard,* 107 N. Y. 73, 13 N. E. 632, 1 Am. St. Rep. 785; *Johnson v. Elkins,* 23 App. D. C. 486; *Witty v. Hightower,* 12 Smedes & M. (Miss.), 478; *Manns v. Flinn's Administrator,* 10 Leigh (Va.), 93; *Campbell v. Hughes,* 12 W. Va. 183; *Gill v. Rice,* 13 Wis. 613; *Van Orman v. Spofford, etc.,* 20 Iowa, 215; *McDonald v. Cruzen,* 2 Ore. 259; *Powell v. Dayton, R. Co.,* 14 Ore. 22, 12 Pac. 83. And see *Koch*

v. Purcell, 45 N. Y. Super. 162. As said in *Powell v. Dayt R. R. Co., supra:* "This discretion, of course, is a judicial d cretion, not arbitrary, and is always to be exercised in furth ance of justice."

There is no occasion in this case for an order in the natu of a *procedendo,* as the claim is not barred by the statute of lin tations, but within the principle of the procedure just indicat we regard ourselves as warranted in disposing of the essenti question concerning which the parties have challenged the co sideration and judgment of the court.

Judgment affirmed.

BELL TELEPHONE CO. v. DETHARDING.

Circuit Court of Appeals, Seventh Circuit — Oct. 2, 1906.

148 Fed. 371.

1. TELEPHONE COMPANIES — MAINTENANCE OF WIRES IN PROXIMITY TO EL TRIC LIGHT WIRES. — Where the sole ground of action is that the defe ant telephone company was negligent in the construction and maintena of its wires over and across electric light wires, whereby a guy wire came charged with a dangerous current causing the death complained *held,* that where failures in the telephone service followed an atmosph disturbance it fairly justifies the inference that the wires were prop maintained up to that time.
2. SAME — "TROUBLE FINDER" — ASSUMPTION OF RISK. — Where a phone wire sagging across an electric light wire became charged electricity which it communicated to a guy wire from grasping which ceased, while climbing a pole, received a shock causing death, *held* the danger was assumed by the deceased when he entered upon the c pation of "trouble finder."

In error to the Circuit Court of the United States for Eastern District of Illinois.

Statement of facts by KOHLSAAT, Circuit Judge:

On May 26, 1904, the "wire chief" of plaintiff in error received word at office in East St. Louis that certain of the telephones served by the compa drop lines leading to the Metropolitan Building, situate at the northwest ner of Fifth street and Missouri avenue, in that city, were out of or Intestate of defendant in error, who was at the time in the service of plaintiff in error as a so-called "trouble man," was sent by the wire chie what was known as the "cable pole," located in the vicinity of the ser

complained of, to open the line, and discover whether the trouble lay between the cable pole and the office, or between the cable pole and the disabled telephone. He proceeded to the cable pole, and began to climb it. As he laid hold of a guy wire affixed to the cable pole at the distance of about ten feet from the ground, he was seen to shudder and fall to the sidewalk, striking upon and fracturing his skull, from the effects of which he died shortly after. To recover the statutory amount for wrongfully causing his death, this suit was brought. The accident resulted from the sagging of the drop lines (which were originally constructed so as to run over and across certain electric light lines carrying a current of high voltage) down upon the latter in such a manner as to charge the drop lines, and through them, by means of certain so-called "bridle lines" upon the cable pole, the said guy wire with a high degree of voltage. It does not appear that either of the parties knew of the condition existing in the said guy wire at the time. From the evidence it appears that the cable pole is wrapped with wire, commencing about eighteen inches from the ground, and extending upward to about six feet. Fastened around the pole, and in contact with this wrapping of wire, was a peanut stand, so arranged as to form a circuit medium from the wire to the ground. A man standing upon the wire and grasping the guy wire formed a complete circuit.

The first declaration of defendant in error contained two counts. The first charged that it was the duty of plaintiff in error to so equip and maintain its poles and wires and guy wire that it would be reasonably safe to work about them, and that, while using due care, decedent of defendant in error was ascending one of the poles, and came in contact with the guy wire. The second charges that while acting under the express orders and direction, with all due care, he was ascending one of its poles, and his hand came in contact with the guy wire.

To these counts plaintiff in error filed a demurrer, which was confessed, and an amended declaration substituted. This contains one count, which charges plaintiff in error with negligence in constructing and maintaining its said wires over and across the said electric light wires, in such a manner as to permit their contact with said light wires, and thereby to become charged with a current of high voltage and communicate it to said guy wire, whereby, while acting under instructions, the intestate of defendant in error was killed. To this declaration plaintiff in error filed a plea of not guilty, and also, by leave of court, a plea of the statute of limitations, alleging that the amended declaration set out a new cause of action, and that the statutory period for bringing suit had elapsed. To this latter plea defendant in error filed a general replication, which was demurred to, and the demurrer overruled. The cause then went to hearing upon the plea of not guilty, and a verdict for $5,000 was given, upon which judgment was entered. At the close of the evidence for defendant in error, plaintiff in error moved the court to instruct for it, which was denied. The same motion was denied at the conclusion of all the evidence. Among other matters, the court instructed the jury that "the plaintiff has charged in his amended declaration, in effect, that the defendant failed to use ordinary care in the erection and maintenance of its telephone pole and drop wires entering the Metropolitan Building, in consequence of which such drop wires came in contact with an electric wire, and thereby became charged, and conducted such charge of electricity to the guy wire in

question, whereby the deceased was shocked and killed;" and in another part of the instructions told the jury: "And if you further believe from the evidence that the said crossed wires was not one of the ordinary hazards assumed by the deceased in his employment, * * * then the jury will find the issues in favor of the plaintiff;" both of which instructions were excepted to by plaintiff in error.

The errors assigned, so far as material here, are: First. The overruling of the demurrer to the replication to the plea of statute of limitations. Second, third, and fourth. The refusal of the court to take the case from the jury. Fifth and sixth. The aforesaid clauses from the court's instructions. Seventh. The refusal of the court to grant a new trial.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

Amos C. Miller, for plaintiff in error.

B. H. Canby, for defendant in error.

Opinion by KOHLSAAT, Circuit Judge:

Under the practice of the Federal Court, no error can be assigned upon the refusal of the court to grant a new trial. *Addington v. United States,* 165 U. S. 184, 17 Sup. Ct. 288, 41 L. Ed. 679; *Blitz v. United States,* 153 U. S. 308, 312, 14 Sup. Ct. 924, 38 L. Ed. 725; *Waterhouse v. Rock Island Alaska Min. Co.,* 97 Fed. 466, 477, 38 C. C. A. 281.

The sole ground of action set up is that the telephone company was negligent in the construction and maintenance of its wires over and across the electric light wires, whereby the guy wire became charged with a dangerous current, causing the death complained of. Unless the fact that the wire sagged down upon the

dence upon which the jury could base such a finding. Moreover, decedent of defendant in error was charged as one skilled in the business with the duty of ascertaining the cause of the interruption of telephone service. He was seeking the very trouble which killed him. He knew there was something wrong, and that the business was very dangerous. He knew he could protect himself by the use of rubber gloves, and that such precaution was usual. There were no representations made to him that anything about the premises was safe. The crossed wires were not easily discernible. Nobody knew what was the matter. Nor is any lack of diligence on the part of defendant below shown. The danger came clearly within those assumed by him when he entered upon the occupation of "trouble finder" for plaintiff in error. Such being the case, no recovery can be had (*Tuttle v. Detroit G. H. & M. Ry. Co.*, 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114; *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 655, 6 Sup. Ct. 590, 29 L. Ed. 755; *District of Columbia v. McElligott*, 117 U. S. 621, 6 Sup. Ct. 884, 29 L. Ed. 946), and the motion to take the case from the jury should have been granted. The amended narr. does not in our judgment present such a departure from the cause of action assigned in the original declaration as to make it a new cause of action. In view of the foregoing, it becomes unnecessary to pass upon the other errors assigned by plaintiff in error. The judgment is reversed, and the cause remanded for a new trial.

ARMOUR PACKING COMPANY v. EDISON ELECTRIC ILLUMINATING COMPANY OF BROOKLYN.

New York Appellate Division, Second Department — Oct. 5, 1906.

115 App. Div. 51, 100 N. Y. Supp. 605.

1. ELECTRIC LIGHTING COMPANIES — WHEN CANNOT DISCRIMINATE BETWEEN CUSTOMERS. — An electric lighting company, which uses public streets or highways, is a public service corporation, and is subject generally to the

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Discrimination by Electric Light Companies. — An electric light company, being a public service corporation, must furnish light to the inhabitants of a municipality without discrimination, and at a reasonable rate. *Cincinnati, etc., Co. v. Bowling Green*, 57 Ohio St. 336, 49 N. E. 121. But under conditions which are dissimilar a difference in rates may not amount to unjust discrimination. *Mercur v. Media Elec. L., H. & P. Co.*, 19 Pa. Super. Ct. 519.

rules which govern common carriers and may not discriminate between its customers.

2. SAME — RECOVERY OF EXCESS PAID — COMPLAINT. — A complaint which alleges in substance that such company furnishing electricity to the plaintiff unlawfully and unjustly discriminated against plaintiff by charging other persons a less rate for the same service under similar conditions, and that the payments made by the plaintiff were made after notice or knowledge that others were receiving more favorable rates, etc. states a cause of action to recover the excess paid.

3. SAME — DEFENSE. — Under such circumstances a recovery is not barred on the theory that the payments made by the plaintiff were voluntary for as the plaintiff had no knowledge of the discrimination, such payments were made under mistake as to material fact. A separate defense which alleges that said payments were made by the plaintiff pursuant to a specific contract fixing the rate does not state a defense and is subject to demurrer.

Appeal by the plaintiff from a judgment of the Supreme Court in favor of the defendant overruling the plaintiff's demurrer to the defendant's answer and dismissing the complaint upon the merits. *Reversed.*

Before HIRSCHBERG, P. J., and HOOKER, RICH, MILLER, and GAYNOR, JJ.

Philip B. Adams, for appellant.

John L. Wells, for respondent.

Opinion by HOOKER, J.:

The plaintiff was a consumer of electricity for lighting purposes which had been supplied by the defendant. The action is to recover back a sum of money which it is alleged was paid to the defendant for this service over and above the sums paid by other persons, firms, and corporations under similar circumstances and conditions, on the theory that the sums charged to the plaintiff were excessive and unjust to the extent of the amount of the excess over the rate charged for the same service under the same conditions to others. For a separate defense the defendant in his answer alleges that the payments made by the plaintiff were pursuant to the terms of a written contract which had theretofore been entered into between the parties respecting the services rendered by the defendant to the plaintiff. The defendant demurred to this separate defense on the ground that it was insufficient in law upon the face thereof. The learned court below, looking into

the sufficiency of the complaint and directing judgment dismissing the complaint, said:

"The defendant was under no statutory obligation to furnish light at any particular price and under the common law as established by the decisions of the courts of this State the complaints do not state facts sufficient to constitute a cause of action. In no essential feature can these cases be distinguished from the case of *Killmer v. N. Y. Central & H. R. R. R. Co.*, 100 N. Y. 395, 3 N. E. 293, 53 Am. Rep. 194."

On demurrer to the answer on the ground of insufficiency, the defendant might attack the complaint because it does not state facts sufficient to support a cause of action. The demurrer searches the record for the first fault in pleading, and reaches back to condemn the first pleading that is defective in substance, because he who does not so plead as to invite an issue cannot compel his adversary so to plead as to accept it. *Baxter v. McDonnell,* 154 N. Y. 432, 436, 48 N. E. 816. It is proper for us then to consider first whether the complaint states a cause of action, and if the conclusion is reached that it does, a discussion of the separate defense contained in the answer should follow.

The complaint shows the incorporation of the parties and alleges that for the purpose of supplying its customers with electricity for lighting and heating purposes defendant used the public highways, streets, and alleys, and public and private buildings; that on or prior to February 8, 1900, the plaintiff requested the defendant to furnish it electric current for lighting and power at four different places; and that from that time for the period of something over four years the plaintiff consumed a large amount of electricity at the places it was supplied, and that the defendant charged and plaintiff paid at the average rate of $17^{26}/_{100}$ cents per kilowatt hour, which defendant demanded and plaintiff paid in full at the expiration of each month or when the defendant rendered to the plaintiff its bills for each month's service. The "fifth" paragraph alleges:

"Upon information and belief that, during all of said period, the defendant wrongfully and unjustly discriminated against the said plaintiff in rendering to other persons, firms, and corporations, under similar circumstances and conditions, the same service at a much less rate or price, to wit, for the average price of nine cents (9¢) per kilowatt hour, and in other instances, rendered the same service under similar circumstances and conditions to other persons and firms upon a sliding price scale of prices of ten, seven and one-half, and five cents per kilowatt hour."

The plaintiff also alleges that the sum so received by the defendant was excessive and unjust to the extent of the amount of the excess over the rate charged for the same service under the same conditions to other of its customers. The "eighth" paragraph of the complaint alleges:

"That all of the payments made by the plaintiff to the defendant, as set forth in paragraph fourth of this complaint, were made by the plaintiff without any notice or knowledge that others of the defendant's consumers were receiving a more favorable rate, and were made under the assumption and belief that the defendant was computing the bills of all of its customers for similar service at the same rate charged this plaintiff."

The plaintiff alleges that before the commencement of this action the plaintiff demanded from defendant the repayment of the whole of the overcharge which was refused by the defendant, and asks judgment for the excess.

The defendant is a public service corporation subject generally to the rules and conditions which govern common carriers and as such may not discriminate between its customers. It is said in 10 Am. & Eng. Enc. of Law (2d ed.) 869:

"Electric light companies, being given the use of the streets and public ways for the erection of such appliances as are necessary for the maintenance of their works, and having the right to acquire the use of land for their business by writs of *ad quod damnum*, are *quasi*-public corporations, and it is therefore their duty to furnish the city's inhabitants with electric light and to do so upon terms and conditions common to all and without discrimination. They cannot fix a variety of prices or impose different terms and conditions according to their caprice or whim."

The justice of this rule cannot well be doubted. Speaking of similar business, the Supreme Court of the United States has said that:

"The supplying of illuminating gas is a business of a public nature, to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that might be furnished by individual effort." *Gibbs v. Consolidated Gas Co. of Baltimore*, 130 U. S. 396, 400, 408, 9 Sup. Ct. 553, 32 L. Ed. 979.

In *Western Union Telegraph Co. v. Call Publishing Co.*, 5 Am. Electl. Cas. 673, 181 U. S. 92, 21 Sup. Ct. 561, 45 L. Ed. 765, the plaintiff in error was a *quasi*-public corporation engaged in transmitting telegraphic messages for hire. The charge to the defendant in error was $5 per 100 words and to the State Journal Company $1.50 per 100 words. The Call Publishing Company

had judgment against the telegraph company on the theory that it had been unjustly discriminated against. The opinion in the Supreme Court states (page 99 of 181 U. S., page 563 of 21 Sup. Ct. [45 L. Ed. 765]):

"The case, therefore, was not submitted to the jury upon the alleged efficacy of the Nebraska statute in respect to discriminations, but upon the propositions distinctly stated, that where there is dissimilarity in the services rendered, a difference in charges is proper, and that no recovery can be had unless it is shown, not merely that there is a difference in the charges, but that that difference is so great as, under dissimilar conditions of service, to show an unjust discrimination, and that the recovery must be limited to the amount of the unreasonable discrimination. No one can doubt the inherent justice of the rules thus laid down. Common carriers, whether engaged in interstate commerce or in that wholly within the state, are performing a public service. They are endowed by the state with some of its sovereign powers, such as the right of eminent domain, and so endowed by reason of the public service they render. As a consequence of this, all individuals have equal rights both in respect to service and charges. Of course, such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same line. But that principle of equality does forbid any difference in charge which is not based upon difference in service, and even when based upon difference of service, must have some reasonable relation to the amount of difference, and cannot be so great as to produce an unjust discrimination."

Both reason and authority, therefore, sustain the plaintiff's contention that the defendant engaged in public service may not discriminate against it in favor of others in charges for the same service and under the same conditions.

The case of *Killmer v. N. Y. C. & H. R. R. R. Co.*, 100 N. Y. 395, 39 N. E. 293, 53 Am. Rep. 194, cited by the learned Special Term, is not in point. There the plaintiff based his claim entirely upon an excessive and unreasonable charge, and it was not at all founded on the theory of an unjust discrimination. There was no proof in that case that the same or similar service had been rendered under the same or similar circumstances and conditions to others for a lesser rate.

The respondent urges strenuously that the plaintiff paid the full amount of the bills rendered him voluntarily and without such mistake of fact as will permit it to recover in this action. The general rule is that money paid under mistake of a material fact may be recovered. The difficulty in applying this rule is to

determine what "material facts" are. Little of that difficulty is experienced in the case at bar, for the ignoranee alleged in the complaint is in respect to the lesser charges made others for the same service under the same conditions, and that ignorance of this fact is ignorance of a material fact must be apparent when it is considered that the charge of a lesser rate to others is in itself the unjust discrimination which is the gist of this action.

These facts lead to the conclusion that the complaint states facts sufficient to constitute a cause of action. The remaining inquiry presented by the plaintiff's demurrer to the separate defense in the answer is whether that defense is a mere allegation that payments were made pursuant to specific contracts. It being a separate defense, it must be treated as a complete defense to the whole cause of action. That it is insufficient in law almost follows as a corollary to the proposition that the defendant may not lawfully discriminate against the plaintiff in matter of charges in favor of others where the conditions are similar. In *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 23 L. Ed. 872 it was said that the express company could not escape liability by reason of a stipulation in its contract limiting its common-law liability. Here the plaintiff contracted to pay certain rates in ignorance of the unjust discrimination the defendant was making against him, which discrimination has been shown to be unlawful, and certainly the payment cannot attain to the dignity of a defense complete in itself simply because it was the subject of a contract between the parties. The contract itself was a part of

ARMOUR & CO. v. EDISON ELECTRIC ILLUMINATING CO.

New York Appellate Division, Second Department — Oct. 5, 1906.

115 App. Div. 57, 100 N. Y. Supp. 609.

PLEADING — ANSWER — WHEN ALLEGATION OF PAYMENT OF CHARGES FOR ELECTRIC LIGHTING DOES NOT SET OUT ACCORD AND SATISFACTION. — **When a plaintiff sues to recover sums paid to defendant electric lighting company under a contract which unjustly discriminates against the plaintiff by requiring higher rates than those given to other customers, it is no defense to allege that such payments were made under a specific contract, and that prior to the action the plaintiff settled and adjusted all accounts with the defendant and paid the same in full. Such allegation does not set out an accord and satisfaction or a release of the plaintiff, for it fails to allege that an adjustment was made as to matters alleged in the complaint which is founded on an unjust discrimination, the payments alleged being merely a part of the plaintiff's cause of action.**

Appeal by the plaintiff from a judgment of the Supreme Court in favor of the defendant overruling the plaintiff's demurrer to the defendant's answer and dismissing the complaint on the merits. *Reversed.*

Before HIRSCHBERG, P. J., and HOOKER, RICH, MILLER, and GAYNOR, JJ.

Philip B. Adams, for appellant.

John L. Wells, for respondent.

Opinion by HOOKER, J.:

This appeal presents all of the questions decided in *Armour Packing Co. v. Edison Electric Illuminating Co.,* 100 N. Y. Supp. 605, decided herewith. An additional question arises here in this manner: The defendant in addition to alleging that the payments were made pursuant to specific terms in writing between the parties, avers a second separate defense that, prior to the commencement of this action, the plaintiff settled and adjusted all accounts of the defendant against the plaintiff for electric light current furnished at the localities named in the complaint, and the plaintiff paid defendant in full therefor. The plaintiff demurs to this second separate defense as well as to the other, on the ground that the same is insufficient in law upon the face thereof, and the demurrer should be sustained. This allegation

in the answer is nothing more than a reiteration of the allegations in the complaint that the plaintiff paid in full under its contract for all electric current furnished by the defendant. The suggestion made by the respondent that this is an allegation of accord and satisfaction or a pleading of a release does not meet the situation, for it fails to allege that the adjustment was made of the matters and things complained of in the complaint. The allegation of the payment of the bills is not the allegation of payment of the plaintiff's present claim which is for unjust discrimination, and inasmuch as the gist of the action is an overcharge by reason of unjust discrimination, the payment of the bills is rather a part of the cause of action than a defense.

The judgment in this case must, therefore, also be reversed, and the entire demurrer sustained.

Judgment reversed, and demurrer to the separate defense sustained, with costs, and new trial granted; costs to abide the final award of costs. All concur.

CONNELL v. KEOKUK ELECTRIC RAILWAY & POWER CO.

Iowa Supreme Court — Oct. 16, 1906.

131 Iowa 622, 109 N. W. 177.

1. DEATH BY CONTACT WITH UNINSULATED WIRE — TRESPASSER — LICENSEE — EVIDENCE — QUESTION FOR JURY. — In an action to recover for the death of a boy fourteen years of age, caused by coming in contact with an uninsulated wire of defendants on land of one H., *held*, that it was a question for the jury, under the evidence, whether H. had to such an extent forbidden and tried to prevent people crossing there as that deceased was to be considered a trespasser, a bare licensee, or licensee by implied invitation.
2. SAME — IMPLIED CONSENT TO GO ON PREMISES. — In an action to recover for death from contact with an uninsulated wire on the premises of one H., *held*, that under the evidence the jury might have found that while H. in some instances forbade people coming upon the premises, the practice of crossing without express permission, but without specific objection, was so general that deceased might have been justified in assuming an implied consent.

Trespassers. — As to when a trespasser may recover for injuries and as to the duty of an electric company toward trespassers, see *Daltry v. Media Electric L., H. & P. Co.*, *ante*, and note thereunder.

3. LICENSEE — INSTRUCTIONS — SPECIFIC FINDING. — Where the jury were instructed that if deceased was upon the premises as a licensee by express or implied invitation he was rightfully upon the land and inferentially was entitled to recover for injury by the negligence of defendant, while if he was a bare licensee simply entering without objection or by sufferance and without express or implied invitation, then he had no right to recover, *held*, that a specific finding that at the time and place of the accident deceased was not on premises where he had a right to be, must be regarded as a specific finding that he was a bare licensee.

4. SAME — MOTION FOR JUDGMENT. — In an action to recover for death of deceased where there was a general verdict for plaintiff, and where the court had explicitly instructed the jury that if deceased was a bare licensee he could not recover, and the jury had made a specific finding that deceased was a bare licensee, *held*, that if the instructions were binding upon the trial court in passing upon a motion for judgment for defendant notwithstanding the verdict, then the motion was improperly overruled.

5. OWNER OF PRIVATE GROUNDS — DUTY TO TRESPASSERS. — The owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, intruders, idlers, bare licensees, or others who go upon them, not by any invitation, express or implied, but for their own purposes, their pleasure, or to gratify their curiosity, however innocent or laudable their purpose may be.

6. UNINSULATED WIRES — INJURY TO TRESPASSER. — In an action to recover for death from contact with uninsulated wire of defendants on the land of one H., *held*, that it did not matter whether deceased was a trespasser, bare licensee, or rightfully on the premises as to H., but that the controlling consideration in determining defendant's liability was whether defendant was reasonably chargeable with knowledge that persons were likely to come in contact with its dangerous wire, and might, in the exercise of reasonable care, have avoided such danger.

Appeal by defendant from verdict for plaintiff. *Affirmed.*

Hollingsworth & Blood, for appellant.

Hughes & Sawyer, for appellee.

Opinion by McCLAIN, C. J.:

The facts which the evidence tended to estabish, so far as material for the determination of the errors relied upon, are as follows: The scene of the accident was an uninclosed and unimproved tract of rough land, covered with trees, brush, and weeds, belonging to one Hubinger, constituting a portion of the premises occupied by him as a residence, and extending from a fence or wall, which constituted the boundary between the improved and the unimproved portions of his tract, to the river. Over this portion of Hubinger's property, the defendant was maintaining its electric light and power wires, supported on poles, the wires being

in general insulated. Deceased, a boy of fourteen years of age, with two companions a few years older, went upon this uninclosed and unimproved portion of Hubinger's premises to get some zinc which had been thrown away, in order that they might sell it for junk. Deceased in some way came in contact with defendant's wire where it had been allowed to sag and where the insulation had been worn off, apparently by contact with a tree, and was instantly killed by the shock. The evidence tended to show that there were some paths running in various directions across this unimproved portion of Hubinger's property, along which persons were in the habit of passing. It may fairly be said to have been a question for the jury, under the evidence, whether Hubinger had to such an extent forbidden and tried to prevent people crossing there as that deceased and his companions going on the land without express permission were to be considered trespassers, or whether they were bare licensees, or licensees by implied invitation. It is not contended that deceased and his companions had been directly forbidden to come upon the premises. The assigned errors argued for appellant relate to certain special findings of the jury bearing on the questions whether deceased was so far a trespasser and without right at the place where the accident occurred that the defendant owed him no duty, and whether there is any evidence that the negligence of the defendant in allowing its wire to sag and become uninsulated at the place of the accident was the proximate cause of decedent's death.

The evidence tended to show that the portion of Hubinger's premises on which the accident occurred was so far generally used by the public that the defendant was bound to anticipate danger to some one from allowing its wires without proper insulation to sag so that persons thus using the premises were in danger of coming in contact with it and receiving injury, and the court instructed the jury that, if it was found from a preponderance of the evidence that the place where the injury occurred was so resorted to by persons generally, of which fact defendant's servants had knowledge or should have had knowledge under the circumstances, then it was the duty of defendant through its servants to exercise ordinary care and diligence to prevent such danger, and the failure to exercise such care and diligence would constitute negligence on the part of the defendant. As to the correctness of

this instruction or the sufficiency of the evidence to support a verdict based on the negligence of the defendant, no complaint is made. But it is contended for appellant that in answers to interrogatories submitted to them the jury specially found deceased to have been on the premises without right. These findings so far as material to this question were as follows:

"Int. 8. Did William Connell have the consent of the owner or occupant of the land where the alleged injury occurred, to go upon said land at said time? A. No. Int. 9. Was William Connell at the time and place of said accident on premises where he had a right to be? A. No. * * * Int. 11. Did J. C. Hubinger prior to, and including the time of, the accident forbid persons from entering upon the land where the alleged injury occurred A. Yes. * * * Int. 14. Was the place where the alleged injury occurred public or private at said time? A. Private. Int. 15. Was William Connell invited to go upon said land at the place where said injury occurred at the time of same? A. No."

In determining the legal effect of these findings, it is proper to take into consideration the instructions in which the jury were told, after being properly instructed with reference to defendant's negligence as already indicated, that a trespasser is one who enters upon the land of another without the consent, either express or implied, of the owner or occupier thereof, but that persons entering such land with the implied consent of the owner or occupier would not be regarded as trespassers; and that if the public generally went upon the premises in question without objection on the part of the owner, and this was generally known, then persons entering upon such premises could not be regarded as trespassers or wrongdoers, by merely so entering; and that, if it should be found that Hubinger forbade people entering upon his premises, then persons entering contrary to such objections must be regarded as trespassers, and that, if deceased knew that he was going upon said premises against the objections of the said Hubinger, he was a trespasser at the time and place of the injury, and plaintiff could not recover.

It is to be noticed that there is no direct finding as to whether or not deceased was a trespasser under these instructions, and perhaps the finding that deceased did not have the consent of the owner or occupant to go upon the land, and that Hubinger had forbidden persons from going there, and that the premises were private, would not conclusively show that deceased was a trespasser, for there is no specific finding as to implied consent.

Under the evidence the jury might have found that, while Hubinger in some instances forbade people coming upon the premises, the practice of crossing without express permission but without specific objection was so general that deceased might have been justified in assuming an implied consent. But the court further instructed the jury as follows:

"A license to go upon the land of another may be by an invitation either express or implied, or one may be licensed simply by the permission or consent of the owner of land to pass over same. A licensee by express invitation is one who is directly invited by the owner of the land to enter upon it, and such person is rightfully upon such land. A licensee by implied invitation is one who has been invited to enter upon the land either by the owner or occupier of the same by some affirmative act done by such owner or occupant, or by appearances which justify persons generally in believing that such owner or occupant had given his consent to the public generally to enter upon or to cross over his premises, and while such licensee is acting within the scope and limit of such implied invitation he has the lawful right to be where he is so invited. A bare licensee is one who enters upon the land of another simply without objection of the owner, or by sufferance of the owner or occupier, whether such land be inclosed or uninclosed. Such bare licensee enters the land at his own risk, and if, while on said land, such bare licensee be injured by the negligence of the owner or occupant of said land he has no right to recover. And, if the jury find from a preponderance of the evidence that the said William Connell, deceased, while upon the premises in question, was a bare licensee under the law as defined in the instructions given you by the court, then, if you so find, your verdict should be for the defendant."

It is to be noticed that, while the instruction previously described related to the question whether deceased was a trespasser, and the effect of the finding that he was such trespasser, this last instruction related to the question of license, and the jury were told that, if deceased was upon the premises as a licensee by express or implied invitation, he was rightfully upon the land, and inferentially was entitled to recover for injury by the negligence of defendant, while, if he was a bare licensee simply entering without objection or by sufferance, and without express or implied invitation, then he had no right to recover. Under this instruction it was material to determine whether deceased had a right to be where he was when injured, or whether he was there merely without objection or by sufferance; and the ninth specific finding is that at the time and place of the accident deceased was not on premises where he had a right to be. In the light of the instructions this must be regarded as a specific finding that he was a bare

licensee, for in no other connection did the court refer to the question of decedent's right to be where he was.

We have, then, this situation: The jury has not specially found whether or not deceased was a trespasser, but it has found that he was not a licensee by express or implied invitation, and, therefore, if the special findings alone are to be considered, he is necessarily found to have been a bare licensee. If the instructions were binding upon the trial court in passing upon the motion for judgment notwithstanding the verdict, then the motion was improperly overruled, for the court had explicitly told the jury that if deceased was a bare licensee he could not recover. And the rule of the instruction has support in cases relating to the liability of the owner of private premises for dangerous conditions causing injury to a trespasser or mere licensee. The general rule is thus stated in 1 Thompson, Negligence, § 946:

"The owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, intruders, idlers, bare licensees, or others who go upon them, not by any invitation, express or implied, but for their own purposes, their pleasure, or to gratify their curiosity, however innocent or laudable their purpose may be."

This rule has been supported and illustrated in the following cases: *Pittsburg, Ft. W. & C. R. Co. v. Bingham,* 29 Ohio St. 364; *Lary v. Cleveland, C., C. & I. R. Co.,* 78 Ind. 323, 41 Am. Rep. 572; *Severy v. Nickerson,* 120 Mass. 306, 21 Am. Rep. 514; *Cumberland T. & T. Co. v. Martin's Adm'r* (Ky.), 8 Am. Electl. Cas. 604, 76 S. W. 394, 63 L. R. A. 469. But, if this general rule is not applicable to the case before us, then the erroneous instruction of the trial court that plaintiff could not recover was not binding upon it in ruling on a motion for a directed verdict, and, if there was any basis on which the general verdict for the plaintiff could be predicated, the court properly overruled such motion.

That the rule requiring the granting of a new trial where the jury has failed in its general verdict to reach the conclusion made necessary by applying to its special findings of fact the rules of law laid down in the instructions is not applicable in ruling on a motion for judgment notwithstanding the verdict, seems to be well settled. In granting a new trial, the court simply enables the complaining party to have his case submitted to the jury under admissible evidence or correct instructions, but, in rendering a

judgment notwithstanding the verdict, the court cuts off any opportunity to cure the error in the instructions or to obviate the deficiencies in the pleadings or the evidence complained of. The rule as announced by us is that, "when a court is called upon to rule upon a motion for judgment on a special verdict, it is free to consider, and should consider, what the law is, and is not bound by its instructions previously given to the jury." *Baird v. Chicago, R. I. & P. Ry. Co.*, 61 Ia. 359, 363, 13 N. W. 731, 16 N. W. 207. And see *Evans v. St. Paul Harvester Works*, 63 Ia. 204, 18 N. W. 881. Therefore the action of the court in overruling the motion for judgment notwithstanding the verdict, on account of the special finding that deceased was not rightfully at the place where the accident occurred, should not be reversed unless such finding is necessarily controlling as to plaintiff's right to recover. The general verdict is controlling as to any issue of fact, properly submitted to the jury, not covered by the special findings. *Schulte v. Chicago, M. & St. P. R. Co.*, 114 Ia. 89, 86 N. W. 63.

There was evidence that persons were in the habit of going across Hubinger's premises near the place where defendant allowed its uninsulated wire to sag in such a way that the safety of such persons was imperiled by it; and we do not think that the question whether such persons were, as to Hubinger, trespassers or bare licensees, on the one hand, or were rightfully on Hubinger's premises on the other, was conclusive as to defendant's liability. The controlling consideration in determining defendant's liability is whether defendant was reasonably chargeable with knowledge that persons were likely to come in contact with its dangerous wire, and might, in the exercise of reasonable care, have avoided such danger. *Daltry v. Media Electric Light, etc., Co.* (Pa.), 9 Am. Electl. Cas. 63, 57 Atl. 833; *Central Union Telegraph Co. v. Sokola* (Ind. App.), 9 Am. Electl. Cas. 323, 73 N. E. 143. Even as to trespassers, the defendant was charged with the duty of not wilfully or wantonly imperiling their safety, and to constitute such wantonness and indifference as to their safety as to render the defendant liable, it is not necessary that there should have been a design or intention to do them injury. *Ambroz v. Cedar Rapids Electric Light & Power Co.* (Ia.), 9 Am. Electl. Cas. —, 108 N. W. 540. There was evidence from

ich the jury might have found that defendant knew of the ngerous condition of its wire, and knew that persons were in habit of going near the place of such danger, and, in support the verdict, we are justified in assuming that the jury predited its verdict against the defendant on this evidence. There nothing in the special findings to negative such conclusion on part of the jury, and, in support of the verdict, we may propy assume that the general verdict was based on such evidence.

It is contended for appellant that the jury failed to find in swer to special interrogatories facts material to the conclusion ached in their general verdict. If the motion had been for a w trial, this might be a good ground for setting aside the verdict. *rling v. West,* 51 Ia. 259, 1 N. W. 531. But, on the other nd, it is well settled that a failure to answer an immaterial errogatory, or an answer in response thereto that the jury does know, will not be a ground for setting aside a general verdict. *tterson v. Omaha & C. B. R. & B. Co.,* 90 Ia. 247, 57 N. W. 0. But a failure to answer an interrogatory is not a good ound for a motion to render judgment notwithstanding the genl verdict. *Pieart v. Chicago, R. I. & P. R. Co.,* 82 Ia. 148, 4, 47 N. W. 1017.

We find no error in the refusal of the trial court to sustain the tion for judgment for defendant notwithstanding the verdict favor of plaintiff, and the judgment on the general verdict is erefore affirmed.

GODDARD ET AL. v. ENZLER.

Illinois Supreme Court — Oct. 23, 1906.

222 Ill. 462, 78 N. E. 805.

DEATH OF EMPLOYEE FROM INCANDESCENT LIGHT WIRE — EVIDENCE — NOTICE OF EXCESSIVE CURRENT ON SECONDARY WIRES. — In an action to recover damages for the death of an employee caused by a shock received

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Hypothetical Questions. — In an action by an employee for an injury ised by an electric shock from contact with defectively insulated wires it s held proper to allow hypothetical questions as to the effect of certain ditions of the wires, although some of the conditions were not shown to st in the particular case, they being shown to be caused by the same genl principles that are supposed to govern electricity, and therefore analo-

from an incandescent light wire carrying an excessive current, *held*, that there was evidence from which the jury might reasonably conclude that the defendant had notice of the dangerous current on the secondary wires a sufficient length of time before deceased was killed to have prevented the accident, either by turning off the current or warning deceased.

2. SAME — EXPERT TESTIMONY — HYPOTHETICAL QUESTIONS — ASSUMPTION OF FUNCTIONS OF JURY. — In an action for death caused by handling an overcharged incandescent light wire, the following hypothetical question was asked: "Suppose that a primary two-wire circuit, carrying about 2,200 volts alternating current, ran to a general electric ten-kilowatt transformer on a pole; that from the transformer a secondary circuit, supposed to be carrying 104 volts, supplying incandescent lights, ran back alongside of the primary wires and from ten to twelve inches distant from them to a pole, and thence to a car barn; that from and inside the car barn to an insulated flexible wire ran back to an incandescent electric light, and a man who was standing on cinders, packed about ten inches deep, grasped hold of the insulated wire or of the light socket and received a shock of electricity which burned his hand and killed him—will you state in your opinion how he might have received that shock?" *Held*, that the above question and the answer thereto did not amount to an usurpation by the witness of the functions of the jury.

3. SAME — EVIDENCE. — In action to recover for death caused by shock received from incandescent light, evidence was offered by a witness of the defendant that he received a shock from the secondary wires leading into the building after deceased was killed, and after the primary wires had been detached from the transformer. Such evidence would not have furnished any excuse for defendants' negligence and was properly excluded.

4. SAME. — Evidence by one of the defendants that he examined the wires after the accident was properly rejected, for such examination would not have tended to show any exercise of ordinary care to avoid the injury.

Appeal by defendants from a judgment of the Appellate Court affirming a judgment for plaintiff. *Affirmed.*

W. N. Cronkrite (*R. J. Carnahan,* of counsel), for appellants.

Douglas Pattison, for appellee.

Opinion by SCOTT, C. J.:

This was an action of case brought in the Circuit Court of Stephenson county by Maria Enzler, as administratrix of the estate of John Anton Enzler, deceased, against A. P. Goddard and

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gous to the case in hand. *Kraatz v. Brush Electric Light Co.*, 3 Am. Electl. Cas. 491, 82 Mich. 457. The facts and circumstances being sufficient to justify an inference that an electric light wire was defectively insulated, and that the decedent came to his death by contact therewith, a hypothetical question assuming such facts was properly allowed. *Economy Light & Power Co. v. Sheridan*, 8 Am. Electl Cas. 795, 200 Ill. 439, 65 N. E. 1070.

L. J. Goddard, the appellants, to recover damages occasioned to he widow and minor children of said John Anton Enzler by eason of his death. The jury returned a verdict for $3,500 in avor of the administratix. After overruling a motion for a new rial and a motion in arrest of judgment, the court entered a judgment upon the verdict. Appellants appealed to the Appellate Court for the Second District, where the judgment of the Circuit Court was affirmed. A further appeal has been prosecuted by ppellants to this court.

The evidence tends to establish the following facts: On November 14, 1902, appellants were operating an electric light plant nd an electric street railway system in the city of Freeport. In onnection with their railway system they used a large brick building as a street car barn, in which cars were kept, cleaned, and epaired. This barn had a flat roof covered with a pitch and ravel composition, and a floor of cinders packed about eight or en inches deep. It was lighted with electricity from the electric ight plant. Some of the wires used in the electric light plant, nown as "primary wires," carried from 2,000 to 2,280 volts of lectricity and were exceedingly dangerous. Other wires, known s "secondary wires," when in proper and ordinary condition arried only 104 volts and were harmless. The primary wires rere only used to transmit the high voltage from the generator to ransformers, where the high and dangerous currents were reduced o low and harmless currents of 104 volts, which were transmitted rom the transformer, over the secondary wires, to and into buildings for lighting purposes.

A vinegar factory was located back and immediately east of the ar barn. North, and across the street from the car barn, was a ole bearing a transformer. Two primary wires extended from a ole in the car barn yard over the roof of the barn to this transormer and carried the dangerous current of electricity to the ransformer. Several sets of secondary wires were supplied with lectricity from the transformer; each set consisting of two wires. One of these sets of wires extended from the transformer, parallel rith the two primary wires, over the flat roof of the car barn, and urnished the electricity for lighting the car barn. Another set f secondary wires from the same transformer furnished electricity o the vinegar factory for lighting purposes. At about 9 o'clock

in the morning of November 14, 1902, an employee of the vinegar factory, while holding in his hand an electric cord in the cellar of that factory, received a shock from the cord which rendered him unconscious and seriously burned and injured his hand. This electric cord connected with the secondary wires which were supplied with electricity from the transformer across the street from the car barn, and was supposed to carry only a harmless current of 104 volts, the same as the secondary wires. F. W. Siecke, the proprietor of the vinegar factory, telephoned to the office of appellants and informed the person who answered the call that one of his employees had been injured by the electric cord, and that there was apparently a stronger current on the wire than there should be. He was told that the matter would be attended to. Siecke testified that his recollection was that he talked to A. J. Goddard over the telephone. When Goddard was called as a witness on behalf of appellants, he testified that he did not receive any such message from Siecke on that day, but that he was told a few days later that such a message had been sent. About 3 o'clock in the afternoon of the same day another employee of the vinegar factory was rendered unconscious, and his hand severely burned while holding another electric cord in the cellar of the vinegar factory. Shortly afterwards Seicke communicated with one Parker, who was engaged in the electrical wiring business in the city of Freeport, and Parker sent an electrician named Baumgartner to the vinegar factory to discover and remedy the trouble with the wires. Baumgartner found the electric cord which had caused the injury to one of the employees above referred to in defective condition and replaced it with a new one. He then took hold of the new cord and received a severe shock, which knocked him down. The cord was taken from him immediately and before he had received any serious injury. Baumgartner then went to appellants' power house, where he found A. J. Goddard at about 5:15 o'clock in the afternoon, and told him about the shock he had received at the vinegar factory. Goddard requested him to return immediately and throw the switch which was located at the entrance of the secondary wires into the factory. By throwing this switch the current of electricity passing over the secondary wires to the building would be prevented from entering the building. A similar switch was located just outside of every building

ito which electric wires extended. Baumgartner did as re-
uested. About 6 o'clock in the afternoon A. J. Goddard and the
iperintnedent of the electric light plant went to the vinegar fac-
ory, which they found locked. It was almost dark. From the
round they made an examination of the primary and secondary
ires in that vicinity, but discovered nothing out of order.

The car barn, as hereinbefore stated, was lighted with elec-
icity supplied from the same transformer as was the vinegar fac-
ory. One of the incandescent electric lamps or bulbs which fur-
ished light for the car barn was attached to one end of an electric
ord; the other end of the cord being connected with secondary
ires coming from the transformer above mentioned over the roof
id into the car barn. This cord was an ordinary electric cord,
onsisting of small wires covered with insulating material; the
ectricity being transmitted over the wires in the cord to the
mp or bulb. The cord was about twenty-five feet in length, was
exible, and permitted the lamp to be taken to any part of the
arn within a radius of twenty-five feet from the point where it
onnected with the other wires. When not in use, the bulb was
ept hanging upon the wall of the barn. John Anton Enzler, on
November 14, 1902, was, and for some time prior thereto had
een, in the employ of appellants engaged in night work at the
ar barn, working from 6 o'clock P. M. to 6 o'clock A. M., and it
as frequently necessary for him, in the performance of his
uties, to use the electric lamp attached to the cord. In doing so
was customary to grasp the cord at a point near the bulb and
arry it in that manner. At 9 o'clock in the evening of November
4, 1902, being the same day the employees of the vinegar factory
ere injured, one of appellants' employees, upon entering the car
arn, found Enzler lying upon his back on the floor of the barn
ear the place where the electric bulb was kept hanging on the
all, grasping said cord near the bulb in his right hand, and the
ord emitting electric sparks at the place where Enzler was grasp-
ng it. Enzler's hand had been severely burned by the electric
ord, and he was then either dead or in a dying condition. When
hysicians arrived he was dead, and their testimony in this case
hows that his death was caused by the electric shock.

The declaration in the case contained nine counts. Some of
he counts alleged the existence of particular defects, and the

charges of negligence in those counts were based upon such defects. It was thus alleged that the insulation around the wires in the electric cord which Enzler grasped was worn and defective; that the insulation on the primary and secondary wires passing over the car barn was defective; that such wires had been constructed and maintained in too close proximity to each other and had become crossed; that the transformer which supplied electricity for the car barn was defective, and permitted a high and dangerous current to pass from the primary wires entering the transformer to the secondary wires issuing from the transformer; and that a defective fuse plug or block had been installed and maintained at the entrance of the secondary wires into the car barn. One count charged negligence, generally, in permitting the machinery, dynamos, wires, and appliances to remain in bad and unsafe repair and condition after notice of such condition, without specifying any defect in any particular part of the system, and another count charged negligence in failing to warn Enzler of the dangerous current of electricity passing through the cord. Appellants filed the general issue. A large part of the evidence in the case consists of testimony given by expert electricians. Many facts of great assistance to the jury were established by such witnesses. It was thus shown that 104 volts of electricity would not kill nor burn a human being, and that it requires at least 500 volts to cause death. It was further shown that if, by any means, a high current should have been communicated to one of the wires issuing from the transformer, it would have extended to and over all secondary wires connected with that transformer. It therefore appeared, without contradiction, that at various times on November 14, 1902, and as early as 9 o'clock in the morning of that day, the secondary wires entering the car barn, and the electric cord which Enzler was required to use at night, were transmitting an unusual and dangerous current of electricity. It is apparent that these facts, together with proof that appellants knew, or could by exercising ordinary care have known, of the existence of this unusual current on the secondary wires, would have imposed upon appellants the duty of preventing such current from entering the car barn or the duty of warning Enzler that such current was passing through the electric cord, and that for a breach of one or the other of such duties, after the lapse of such

time as, under the circumstances, would have been reasonable, appellants would be liable for the death of Enzler. It was shown that shortly after 9 o'clock in the morning Siecke telephoned to the office of appellants that the secondary wires were transmitting an unusual current of electricity; that one of the appellants was informed of the same fact at 5:15 o'clock in the afternoon by Baumgartner. And it further appeared that there was located in the dynamo room of appellants' plant an instrument, known as a "ground detector," which should have indicated a ground on the wires at each of the times the employees were injured at the vinegar factory and at the time Baumgartner received the shock. There was therefore evidence from which the jury might reasonably conclude that appellants had notice of the existence of the dangerous current on the secondary wires a sufficient length of time before Enzler was killed to have prevented such current from entering the car barn at the time when it became necessary for Enzler to handle the electric cord, or had such notice a sufficient length of time before the accident to have warned Enzler of the presence of the unusual current passing through the cord.

Appellants first complain of the action of the court in permitting an expert electrician to answer the following question propounded by appellee:

"Q. Suppose that a primary two-wire circuit, carrying about 2,200 volts alternating current, ran to a general electric ten-kilowatt transformer on a pole; that from the transformer a secondary circuit, supposed to be carrying 104 volts, supplying incandescent lights, ran back alongside of the primary wires and from ten to twelve inches distant from them to a pole and thence to a car barn; that from and inside the car barn an insulated flexible wire ran back to an incandescent electric light, and a man who was standing on cinders, packed about ten inches deep, grasped hold of the insulated wire or of the light socket and received a shock of electricity which burned his hand and killed him — will you state in your opinion how he might have received that shock? A. He might have received that shock by the primary current leaking on to the secondary wire to which the man had his hand attached, and through his feet to the other side of the generator which generated the current which produced the high voltage primary that you speak of."

The principal complaint made to this question is that it calls for the opinion of the expert upon the very question to be decided by the jury, and amounts to an usurpation by the witness of the functions of the jury. From the nature of expert testimony, every hypothetical question propounded to an expert in any case may call for an opinion upon some issue or fact which is to be

determined by the jury, and it is therefore not always a good objection to such question that it calls for an opinion upon a question to be decided by the jury. The opinion of an expert is admitted in any case only from necessity, where some special knowledge not possessed by persons in general, and hence not presumed to be possessed by the jury, is required in reaching a proper conclusion from a given state of facts, and its admission is in no wise an invasion of the province of the jury. The expert witness has nothing whatever to do with settling controverted questions of fact or with determining the credibility of witnesses. His opinion is based upon a state of facts which is assumed to be true, and he is not permitted to expres an opinion as to whether the evidence establishes the assumed state of facts rather than some other state of facts which the evidence tends to prove. It is the province of the jury to determine whether the state of facts assumed by the expert to be true has been establised by the evidence. In case they find that such state of facts has been established, then they are authorized to adopt the opinion of the expert as their conclusion upon that state of facts; but, if they find that such assumed state of facts has not been established, then the opinion of the expert, as a matter of course, cannot be followed by them. It is therefore apparent that the functions of the jury are not usurped by an expert witness who gives an opinion upon some assumed state of facts which the evidence tends to prove, where it requires some special knowledge or skill in order to reach the proper conclusion from that state of facts. The statement found in *Chicago & Alton Railroad Co. v. Springfield & Northwestern Railroad Co.*, 67 Ill. 142, to the effect that an opinion covering the very question to be found by the jury is improper, evidently means that an opinion cannot be expressed upon the ultimate question to be found by the jury, which in this case was whether appellants had been guilty of negligence which caused the death of Enzler. The question above quoted does not call for an opinion on that question, and hence is not subject to this objection made against it.

It is next urged that the question was not based upon the evidence. So far as the question itself is concerned, there is no foundation for such objection, as the evidence tended to prove all the facts assumed therein. From appellants' argument, however, it would seem that the objection intended to be made is that the

witness based his opinion upon certain alleged facts which were not included in the question and not shown by the evidence, but which, from the answer, appear to have been taken into consideration by the expert and assumed by him to be true. If the answer is subject to such criticism, appellants are in no position to complain, as they made no motion to strike out the answer, and the objectionable feature did not appear when the court made its ruling upon the question. We are not called upon to decide whether the above question is objectionable for any reasons other than those above considered.

It is next urged that the court committed reversible error in permitting expert electricians to answer the following questions propounded by appellee:

"Q. How could a higher current than 104 volts get in those secondary wires? A. By the primary and secondary wires getting crossed with one another, the wind blowing them together accidentally, or there might be a leakage in the transformer. Q. Does that sometimes happen — a leakage in the transformer? A. It does on some occasions. Lots of times a transformer is overloaded, and it overheats it, and it gets affected in that way. Q. Might a transformer be so affected that a higher current than 104 volts, and still not 2,280 volts, could go along that secondary wire? A. On one side; yes, sir. Q. Suppose those wires should blow together, and those uninsulated points should come together for an instant; would that be long enough for that high voltage you speak about to go through? A. Yes, sir. Q. How might it be possible to have 500 volts flowing along an incandescent or secondary wire where the following facts are true: That it was a two-wire circuit carrying about 2,000 volts alternating current, running to a general electric ten-kilowatt transformer on a pole, and that from the transformer a secondary circuit supposed to be carrying 104 volts, supplying incandescent lights ran back alongside of the primary wires, and from ten to twelve inches distant from them, to a pole, and thence to a car barn? A. I would think it would be some defect in the transformer. Q. Might it happen from a contact between the primary and secondary wires outside of the transformer at a point where there was no insulation on the primary and secondary wires? A. It might; yes, surely, if they swung together."

If it be conceded that, in the absence of evidence tending to prove that some defect did in fact exist in the transformer, and that primary wires came in contact with secondary wires, testimony that the excessive voltage might have gotten upon the secondary wires by reason of such defects was improperly admitted, still the appellants could not have been prejudiced by the admission of such evidence for the following reason: In order to find from this testimony that there was any defect in the transformer

or any wires crossed, the jury must necessarily have first found that there was a dangerous current of electricity on the secondary wires, as the testimony of the experts in regard to such defects was all predicated on the presence of such current on those wires; and if the appellants had, or ought to have had, notice of any defects in the transformer or wires, it was because the evidence showed that they had, or ought to have had, notice of the presence of the dangerous current on the secondary wires. If the jury found that there was an unusual and dangerous current on the secondary wires, and that appellants had, or ought to have had, knowledge of its presence, then, as hereinbefore said, they owed Enzler the duty of preventing the dangerous current from passing over the cord when he was required to handle it or the duty of warning him of its presence on the wires in the cord, and for a breach of one or the other of these duties appellants would be liable. The evidence in regard to a possible defect in the transformer or wires being crossed could therefore have only been considered by the jury as tending to show additional negligence on the part of appellants, and could not have affected the verdict in this case. The same is true of a diagram used by an expert electrician in showing how a leak might take place between the primary and secondary wires in a transformer by reason of a defect in the transformer.

Appellants offered to show by a witness that such witness received a shock from the secondary wires leading into the car barn about 3 o'clock in the morning after Enzler was killed, and after the primary wires had been detached from the transformer. This evidence would not have tended to furnish any excuse for failing to prevent the dangerous current from entering the car barn or for failing to warn Enzler of its presence on the wires in the cord, and it was therefore not error to exclude it.

A. J. Goddard, one of the appellants, was called as a witness on behalf of appellants, and testified that after the accident to Enzler he made an examination of the wires, taking until nearly 2 o'clock in the morning. He was then asked in what condition he found the wires upon that examination. Appellee objected. The objection was sustained, and the appellants now complain of that ruling. It was not denied that some defects existed which permitted an excessive current to escape to the secondary wires.

What that defect was, or whether, after the accident, A. J. Goddard was able to discover it during the night with the aid of a lantern, could not have affected the verdict in this case. Such examination would not have tended to show any exercise of ordinary care to avoid the injury, nor would it have rebutted any of the evidence tending to show that appellants knew, or could by reasonable diligence have known, of the presence of the dangerous current on the wires in the cord. The rejection of the testimony was therefore not prejudicial.

It is next contended that the court gave to the jury, at the request of appellee, an instruction to the effect that in fixing the damages they might take into consideration the matter of the instruction and moral training of the minor children of deceased, so far as the same appeared from the evidence. It is said that such anticipated loss of instruction and moral training consequent upon the death of the father is not an element of damages in cases of this character. The contrary is expressly decided in *Illinois Central Railroad Co. v. Weldon,* 52 Ill. 290, and in *Chicago, Rock Island & Pacific Railroad Co. v. Austin,* 69 Ill. 426, where it is held proper to instruct the jury that they may take into consideration loss of instruction and moral training, if any, to the minor children by reason of the death of their father, where the evidence tends to show such loss. There was therefore no error in giving the instruction in this case, as the evidence tended to show damage to the minor children on account of the loss of instruction and moral training through the death of Enzler.

Other objections made to rulings of the trial court are entirely without merit.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

FARMER and VICKERS, JJ., took no part in the decision of this case.

VAN ALSTINE v. STANDARD LIGHT, HEAT & POWER CO.

New York Appellate Division, Third Department — Nov. 14, 1906.

116 App. Div. 100, 101 N. Y. Supp. 696.

DEATH OF LINEMAN BY ELECTRIC CURRENT — NEGLIGENCE OF THIRD PERSON — PROXIMATE CAUSE. — In an action to recover for the death of a lineman in the employ of an electric lighting company who had been

sent out to repair certain wires, it appeared that the lineman could not get a proper telephone connection so that he could order the man in charge of the power house to shut off the current; that the voices could not be heard distinctly, and that instead of receiving the lineman's message to shut down "after ten minutes" the man at the power house was directed to shut down "for ten minutes," and that after the lineman had been at work for ten or fifteen minutes the power was turned on and he was killed. *Held,* that a verdict for the plaintiff was against the law where the court charged without exception being taken that the defendant was not liable if the jury believed that the proximate cause of the accident was a misunderstanding due to the imperfect working of the telephone.

Appeal by the defendant, the Standard Light, Heat and Power Company of Unadilla, N. Y., from a judgment of the Supreme Court in favor of the plaintiffs, and also from an order denying the defendant's motion for a new trial made upon the minutes. *Reversed.*

Frank Stewart, for appellant.

William F. Van Cleve, for respondents.

Opinion by CHESTER, J.:

The plaintiffs have recovered a judgment against the defendant for its alleged negligence in causing the death of plaintiffs' intestate, who was a lineman in its employ. The defendant is engaged in furnishing electric light, heat and power to the villages of Unadilla, Sidney and Bainbridge. Its power house is about one mile above Sidney; its wires run from the power house to Bainbridge, about six miles distant in one direction, and to Unadilla, about four miles distant in an opposite direction, as well as to Sidney. On October 7, 1902, the plaintiffs' decedent was directed by the defendant to go to Bainbridge and make certain repairs on some of its wires. Upon arriving there he went to the telephone exchange conducted by the Union Telephone Company and requested the operator there to telephone to the power house to shut off the power as he was ready to go to work. There was some difficulty in talking with the power house, and the message had to be repeated through the operator at Sidney. She testified that the message she repeated to the power house was, "shut off the power after ten minutes," and the answer she got was, "all right," which answer she repeated to the operator at Bainbridge. She testified that she had trouble to make the man at the power

house understand. When the answer "all right" was received by the Bainbridge operator the decedent left the office and went to the pole to work. This was about twenty-five feet high. He was seen upon the pole near the top shortly after, fixing the wires. While he was so at work a flash of light was seen over the wires and decedent threw up his hands and fell back to the ground. He was rendered unconscious and without gaining consciousness died the same day.

The man employed by the defendant at the power house, whose duty it was to shut off and turn on the current there, testified: "The message as I understood, was to take the power off for ten minutes. I did not understand the message when I first received it. I asked (the operator at Sidney) 'For ten minutes?' and she said, 'yes.' * * * I said, 'all right.'" He further testified that he shut off the power for fifteen minutes instead of ten and then put it on and saw something was wrong and took it off again.

It is evident from the testimony of the operators who transmitted the message, and from the testimony of the man at the power house, who received it, all of whom were sworn for the plaintiffs, that there was a clear misunderstanding of the message. While there is a conflict between the testimony of the man at the power house and the one transmitting the message as to what it was, there is no conflict over the question that there was a misunderstanding between them. The court charged the jury that if they believed "the proximate cause of the accident was a misunderstanding which occurred by reason of the imperfect working of the telephone at the time in question the defendant would not be responsible," and also that if the jury believed "the message which Van Alstine sent did not reach the power house in the language which he claims to have sent it, the defendant is not liable." That being the law of the case as laid down by the court, without exception by the plaintiffs' counsel, the verdict rendered is clearly against the law, because the evidence is clear and undisputed that there was a misunderstanding.

It is evident, too, that the man at the power house was not careless in doing what he did. He was not told for what purpose the power was to be shut off, and he did just what he understood he was told to do and took the precaution to leave the power off five minutes more than he was requested.

It is also manifest that if there was any carelessness in the transmission of the message to the man at the power house it was the negligence of the telephone company and not of the defendant.

It is, claimed, however, that the defendant was negligent in not promulgating such proper and suitable rules for the conduct of its business as would have prevented the turning on of the power while the decedent was working on the lines, but no such question as that was submitted to the jury for determination, and consequently it is not here for review. The only statement made by the court to the jury on that subject was to charge them at the request of the defendant's counsel and without exception by plaintiffs' counsel, "that no negligence can be predicated on a failure to promulgate a rule that the power should not be turned on while the lineman is working on the line, as an employer is not obliged to promulgate a rule forbidding its employees from doing an act which would necessarily and obviously result in injury to another employee."

If the jury based their verdict upon the defendant's failure to promulgate such a rule, it could not stand, because it was clearly against the law laid down by the court, without exception, for their direction.

In still a further respect the verdict appears to be against the law of the case as charged by the court without exception, for the jury were instructed "that negligence cannot be imputed to the defendant where it appears that the accident resulted through a misunderstanding which might have happened even if there had been a rule."

The judgment and order should be reversed and a new trial granted, with costs to the appellant to abide the event.

PARKER, P. J., concurred; SMITH and COCHRANE, JJ., concurred in result; KELLOGG, J., dissented.

Judgment and order reversed and new trial granted, with costs to appellant to abide event.

THOMAS V. CITY OF SOMERSET.

Kentucky Court of Appeals — Nov. 22, 1906.

97 S. W. 420.

1. INJURIES FROM CONTACT WITH INCANDESCENT LIGHTS — LIABILITY OF CITY. — Where a boy was injured by placing his hand on an electric light globe in a booth used in the sale of confections, it was *held* that the city was liable for negligence in failing to properly insulate the lamp.
2. ELECTRIC LIGHT COMPANIES — DUTY TO INSULATE APPLIANCES. — It is the duty of electric light companies or persons operating such plants, at points where people have the right to go for work, or business, or pleasure, to have the insulation or protection perfect.

Appeal by plaintiff from a judgment for defendant. *Reversed.*

E. P. Morrow and *W. Boyd Morrow,* for appellant.

O. H. Waddle & Son, for appellee.

Opinion by CARROLL, C.:

The city of Somerset owns an electric light plant, and rented or leased to Elmer Burton for compensation an electric globe with a brass socket, which was installed by it in a booth kept by him in the sale of confections. The globe was inside the booth, and so high that appellant, a boy of seventeen years of age, who was employed by Burton, could only reach it by elevating his hands over his head. He testified, in substance, that, on the evening the injury occurred, it was rather cold and damp, had been raining, and there being no fire in the booth, he put his hand up to the globe for the purpose of warming it, when one of his fingers came in contact with the brass socket, injuring him quite severely. Children and other persons were in the habit of visiting the place for the purchase of candies and nuts, and the globe was so situated that it might have been reached by a man of ordinary size standing on the sidewalk of the city. An electrical engineer, introduced as a witness for appellant, said that the lamp and socket were not properly insulated or protected, and that the dampness of the atmosphere added to the danger incident to coming in contact with it; that if it had been properly insulated, there would be no danger in handling or touching it; but that if exposed to dampness [illegible] the socket would become charged with [illegible] h. Upon

the conclusion of the testimony for plaintiff, appellant here, the court peremptorily instructed the jury to find for appellee, defendant below. It is argued for appellee that the condition of the lamp was unknown to the city, that it had received no request to repair it, nor had any notice that the dampness rendered it dangerous; and, further, that appellant was not required by his duty or business to handle or touch the lamp or socket, and in so doing was a trespasser, and the city owed him no duty, and therefore he could not recover. It was held by this court in *McLaughlin v. Electric Light Co.*, 6 Am. Electl. Cas. 255, 38 S. W. 851, 18 Ky. Law Rep. 693, 34 L. R. A. 812, to be the duty of electric lighting companies or persons operating such plants, at points where people have the right to go for work, or business, or pleasure, to have the insulation or protection perfect; and for failure in this respect they must respond in damages. This doctrine was followed and approved in *Schwitzer v. Citizens General Electric Co.*, 7 Am. Electl. Cas. 571, 52 S. W. 830, 21 Ky. Law Rep. 608; *Overall v. Louisville Electric Light Co.*, 7 Am. Electl. Cas. 521, 47 S. W. 442, 20 Ky. Law Rep. 759; *City of Owensboro v. York*, 117 Ky. 294, 17 S. W. 1130; *Lexington Railway Co. v. Fain*, Am. Electl. Cas. 499, 71 S. W. 628, 24 Ky. Law Rep. 443.

Applying the rule announced to the facts of this case, we are of the opinion that it was error to take the case from the jury. The electric globe or light by which appellant was injured, was not perfectly insulated or even properly protected. If it had been, the injury would not have occurred. Appellant was not a trespasser. He had the right to be where he was; but if he had been passing along the street, and had touched the globe with his hand as he might have done, the city would be equally liable, if it committed a breach of duty in failing to have and keep the electric globe, that was placed in a position where it might have been touched by persons walking along the streets, perfectly insulated. It is said by counsel that the evidence does not show that the city had any control of the globe, or that it was its duty to keep it in repair. The evidence, however, does establish that the globe was installed by the city and compensation was received by it from Burton, and this imposed upon the city the duty exacted of owners and operators of electric light plants; and it could not escape responsibility upon the plea that the evidence did not

show whose duty it was to keep this globe properly insulated. *Thomas v. Maysville Gas Co.*, 7 Am. Electl. Cas. 588, 56 S. W. 153, 21 Ky. Law Rep. 1699, 53 L. R. A. 147.

The judgment is reversed, with directions for a new trial.

YAZOO CITY v. BIRCHETT.

Mississippi Supreme Court — Dec. 1, 1906.

89 Miss. 700, 42 So. 569.

1. LIABILITY OF CITY FOR NEGLIGENCE IN MAINTAINING ELECTRIC LIGHTING SYSTEM. — Where a city embarks in the management of any utility for profit, as an electric lighting system, it is liable, or not liable, by precisely the same rules applicable to private corporations or individuals conducting such enterprises.
2. DEATH OF LINEMAN FROM CONTACT WITH GUY WIRE — NEGLIGENCE — PROXIMATE CAUSE. — Where a telephone lineman ascending a pole to ascertain the cause of trouble was killed by a circuit formed by what should have been a cold and harmless guy wire with a high-voltage death-armed wire of the city, negligently put in circuit with it, the negligent current on the guy wire was the proximate cause of the accident.

Appeal by defendant from a judgment in favor of plaintiff. *Affirmed.*

Williams & George, Campbell & Campbell, and *Green & Green,* for appellant.

Henry, Barbour & Henry and *J. A. P. Campbell,* for appellee.

Opinion by CALHOON, J.:

On both sides this case has been argued orally and by brief with thoroughness. It is needless to get outside the written arguments for authorities. The instructions on either side present every possible view of the law which could be fairly contended for. There is nothing to be said for either, as to the negligence of the city or the contributory negligence of the deceased, which has not been urged below and here. The jury had the whole case. There was testimony going to show gross negligence on the part of the

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Liability of City for Negligence in Maintaining Electric Lighting System. — See *Davoust v. City of Alameda, ante,* and note thereunder.

city, and testimony going to show that the deceased did no more than an ordinarily prudent man might do. When a city embarks in the management of any utility for profit, it is liable, or not liable, by precisely the same rules applicable to private corporations or individuals conducting such enterprises. The fact that the city was the owner probably explains the serious tone of the defense. Many times the importance of a party makes the gravity of the case.

On the verdict we must see, as best we can, what was the observation of the jury on the facts shown. They saw that telephone wires were not hurtful on contact, that Birchett went to correct a trouble with Birdsall's telephone connection, that he went directly to the telephone pole from which that connection came, and promptly ascended it and was killed by a circuit formed by what should have been a cold and harmless guy wire with a high-voltage death-armed wire of the city, negligently put in circuit with it, which he did not see, or, if he did see, was not apparently dangerous where he was. There was no danger from the connection of the incandescent wire east on North alley with the guy wire there, if it had not been in connection with the guy wire south on Washington street at the top of the city's pole. A process of elaborate inductive reasoning is not to be attributed to a man in the discharge of ordinary duty in an ordinarily harmless function. The attachment of the hay wire to the step of the telephone pole, of which all seem ignorant, may have been the fact without which the calamity would not have occurred; but all the same, the negligent current on the guy wire was the proximate cause of the death, and the jury did not hold Birchett to a strict scrutiny of every step he took up the pole.

The reading of counsel of the instructions refused to the other side, under the circumstances, if error at all, was not objected to at the time. The other two matters in this argument, if reversible hurtful ordinarily, are not so here, because withdrawn and the jury admonished. Jurors are not to be regarded as senseless objects.

If anything could result from Birchett's seeing the trouble on North alley, there was very strong testimony that he could not have seen it.

Affirmed.

COLORADO SPRINGS ELECTRIC CO. v. SOPER.

Colorado Supreme Court — Dec. 3, 1906.

38 Colo. 141, 88 Pac. 165.

1. INJURY TO CHILD BY CONTACT WITH LIVE WIRE IN PUBLIC PLACE — AMOUNT OF DAMAGES. — In an action to recover for injuries sustained by a child from coming in contact with a live wire in a public place, it appeared that previous to the accident the child was strong and healthy; since that time she has been sick with some nervous affliction. For some little time there was a slight curvature of the spine which had been relieved previous to the trial. One side of the chest was considerably enlarged at the time of the trial. She was excessively nervous and improperly nourished. *Held*, that a verdict of $3,750 was not excessive.
2. SAME — EVIDENCE AS TO MEDICAL TREATMENT. — In an action brought by a child to recover for injuries sustained from an electric shock, it was not prejudicial error to admit testimony as to proper treatment required to produce a speedy recovery, for the parents were bound to furnish the child with proper medical attendance, and this could not be made a charge against the defendant.
3. INSTRUCTIONS — EXPERT TESTIMONY. — In an action brought by a child to recover for injuries sustained by a shock from an electric wire, the court was not justified in instructing the jury that the plaintiff would, in all probability, entirely recover within two or three years, and that she was not entitled to judgment for any permanent injuries, where some of the expert witnesses testified that, under favorable circumstances, the child might become cured within a year or two or three years; and others that, under certain circumstances, the effects of the shock might remain through womanhood.

Appeal by defendant from a judgment for plaintiff. *Affirmed.*

Hall, Babbit & Thayer and *F. L. Sherwin,* for appellant.

George W. Musser, for appellee.

Opinion by BAILEY, J.:

This action grows out of the same transaction as that of *Colorado Springs Electric Co. v. Donald C. Soper,* 88 Pac. 161. The plaintiff in this case was the twin sister of the plaintiff in the other case, was injured at the same time, and under the same circumstances, although in a slightly different manner. The verdict rendered in this case was for $3,750.

The first contention of defendant is that the motion for a new trial should have been sustained because the damages awarded were excessive and appear to have been given under the influence of passion and prejudice and because of the insufficiency of the

evidence to justify the verdict. In this case, as in the other, it appears from the testimony of plaintiff's witnesses that, previous to the accident, she was a strong, healthy girl; since that time she has been sick with some nervous affliction. For some little time there was a slight curvature of the spine which had been relieved previous to the trial. One side of the chest, however, was still considerably enlarged at the time of the trial. She was excessively nervous, improperly nourished, and her general condition was much like that more fully detailed in the case of her brother, Donald. Many methods were suggested which might effect a permanent cure, such as removing her to a different altitude, placing her under other conditions, and the like. Without going into further details in this matter, which would be practically a reiteration of what we said in the other case, we will content ourselves by saying that there is sufficient competent testimony to sustain the verdict and that, if the testimony of the physicians and other witnesses called by plaintiff was true, and the jury must have believed it to be so, the verdict is not excessive.

Defendant contends that the court erred in admitting testimony as to the treatment the plaintiff should receive in the future and refusing its motion to strike out a portion of the testimony. In order to present an intelligent idea of this question it is necessary to quote a portion of the testimony of Dr. Smith, plaintiff's witness:

"Q. Doctor, if before this accident the child was perfectly formed, the prominence in the chest was not there, her chest was symmetrical and developed and that thereafter this prominence in the chest appeared — after the accident — to what would you attribute this prominence in the chest? A. Well, that is a pretty hard question to answer. To answer it directly, as the result of the injury, it would have to be a very indirect result; but, knowing no other cause, the girl having no other serious illness, of course anything that is the matter with her as to having a causative relation can only be referred to that in my mind, but the way this could be produced by that would be very indirectly through her malnutrition; that is the only way I could answer that question. * * * Probably by the lack of proper material being supplied to the bones, leaving them soft, and from her bad attitude, her bad habit of position and the like; possibly that could cause it, but that is the only explanation I could give. Q. What would you say would be the treatment she should receive that would conduce more certainly to her recovery, if at all? (Defendant objects because incompetent and immaterial. Objection overruled. Defendant excepts.) A. Well, as for treatment for that girl, it seems to me the only treatment to give her, the only way to look at that is to make it as though she were your own child, consequently she would

be very valuable to you. With unlimited means I would put a nurse with the girl. I would remove her from her present surroundings, probably from her parents. I would take her from this town, give her good food, frequent change. Probably some tonic treatment; if necessary, electricity with medical tonics and massage. I would not bother her very much about school for the present, avoid any excitement of any kind. (Defendant moves to strike out the latter part of the foregoing answer for the same reasons heretofore assigned.)"

The motion was denied and this is what gives rise to the contention of defendant that the court erred. One of the questions before the jury was as to the length of time which the plaintiff would suffer under proper treatment as a result of the injury, and this inevitably presents the question as to what the proper treatment might be. In any event, it being the duty of the parents to furnish proper medical treatment for their child, this could not be made a charge against the defendant. The action having been brought by the child and not for the parents, the witness having been permitted to state what such treatment should be in order to produce a speedy recovery, could not have prejudiced the jury against the defendant. The motion to strike was was too indefinite. Suppose the motion had been granted and the court had instructed the jury that the latter part of the answer would be stricken, what portion would the jury consider was stricken? Would it be that the child should not be bothered much about school for the present, or would it be that she should receive tonic treatment or massage, or would it be that she should be taken from Colorado Springs, given good food and frequent change, or what portion of this treatment was intended to be eliminated by the motion to strike?

Appellant contends that the court erred in refusing to give Instruction No. 8, tendered by it. This instruction is to the effect that, inasmuch as it appears from the testimony of plaintiff's witnesses that, under proper care, plaintiff would in all probability entirely recover from the injurious effect of the accident within two or three years, plaintiff is not entitled to recover for any permanent injuries, and can only recover for her pain and suffering which resulted directly from the accident. In relation to this instruction we desire to again call attention to the testimony of Dr. Smith who stated:

"If she don't get well and is left impaired in strength the most critical period is at the age of puberty, and later through her school life and early

womanhood she is predisposed to any severe illness she may have. * * * Assuming that the girl will get well within a year or two, I don't think the scars upon her hand will have any effect upon her life, but assuming that she will not, which I cannot say, and assuming that she becomes hysterical and neurasthenic and a nervous individual, these scars being located where they are will always suggest to her and will always remind her of the cause of her trouble."

Dr. Jones testified: "If a person does not recover, that is one of the remote effects — complete recovery — and if a person does not recover immediately there may be certain nervous manifestations; a general depletion would be one of the general effects and possibly a tendency to chorea. It is an unlimited subject — the remote effects of shock. It can be almost anything in the way of nervous phenomena, accompaniments of nervous trouble." Upon cross-examination he testified that she might be brought out of that condition within a year or two and a half.

Without going further into the testimony, it is sufficient to say that some of these expert witnesses testified that, under favorable circumstances, the child might become cured within a year or two or three years; some that, under certain circumstances, the effects of the shock might remain through womanhood. Therefore, in the condition of this record, the court would not have been justified in instructing the jury that the plaintiff would, in all probability, entirely recover within two or three years, and that she was not entitled to judgment for any permanent injuries. The court was no better able to determine when the child would recover than the jury.

This disposes of the only questions arising in this case that were not discussed and determined in the case of Donald C. Soper. While, under the entire testimony, it might appear that the judgment in each case is large and that smaller amounts would probably have compensated the plaintiffs for all of the damage which they actually sustained or may sustain, still the jury saw the children, observed their condition at the time of the trial, heard the testimony, and it was for it to determine what the amount of the verdict should be, as long as they kept within reasonable bounds, and we cannot declare, as a matter of law, that these verdicts are so large as to demonstrate that they are the result of passion, prejudice, bias, or any other improper motive. Another jury might render a verdict for a less amount, and, on the other

and, another jury might render a verdict for a greater amount. These matters being within the province of the jury, we are not inclined to interfere, and the judgment will be affirmed.

Affirmed.

The Chief Justice and GODDARD, J., concur.

JACKSONVILLE ELECTRIC LIGHT CO. v. SLOAN.

Florida Supreme Court, Division B. — Dec. 4, 1906.

52 Fla. 257, 42 So. 516.

1. MOTION TO STRIKE OUT IRRESPONSIVE ANSWER. — Where a witness gives an answer not responsive to a proper question propounded to him, a motion to strike out the answer is the proper method of reaching the answer.

2. EVIDENCE. — An electrician of seventeen years' experience may properly be asked whether precautions were necessary in repairing broken electric wires.

3. SAME — DECLARATIONS OR ADMISSIONS. — Where a suit is brought by a widow to recover damages for the death of her husband under sections 2342 and 2343, Revised Statutes of 1892, declarations or admissions of the deceased husband as to his physical condition on the morning before the afternoon when he was killed, are not a part of the *res gestæ*, and are inadmissible against the objection of the widow.

4. INJURY TO SERVANT — ASSUMPTION OF RISK. — There is no absolute rule applicable to all cases by which to determine the question of the liability of the master to the servant, where the servant is injured in the performance of a duty which he was ordered or requested by the master or his representative to perform, but the question of liability will depend upon the circumstances of each case; and where the master or his representative orders or requests the servant to engage in an employment outside the scope of the duties which the servant has contracted to perform which employment is attended with dangers unknown to the servant and not open to his observation, and which are not discoverable by him by means of such an inspection as he has time and opportunity to make, and gives him no instructions with respect to such dangers, and he is injured in consequence of so entering upon the new service, he is not deemed to have accepted the risk of such dangers, and the master is liable in damages for the injury.

5. SAME — CONTRIBUTORY NEGLIGENCE. — When an emergency occurs in a master's business, whose serious nature calls a servant from his regular employment, and he is injured or killed while engaged in the effort to

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Care Required of Electric Companies. — See *Guest v. Edison Illuminating Co., post*, and note thereunder.

relieve the situation, in consequence of some defect or danger imputable to the negligence of the master, the servant is not, as a matter of law, to be charged with contributory negligence, although but for the existence of such emergency he should be barred from recovering, on the ground of being a volunteer and of having accepted the risk.

6. DEATH — BURDEN OF PROOF OF NEGLIGENCE. — In a suit for damages by a widow for the death of her husband, under sections 2342 and 2343, Revised Statutes of 1892, the burden of pleading and proving negligence on the part of the deceased husband is, under law, upon the defendant.

7. INSTRUCTIONS. — In determining the correctness of a particular charge, all the charges given should be considered and construed as a whole.

8. SAME. — There is no error in refusing a peremptory charge for the defendant when there is evidence upon which the jury might find a verdict for plaintiff.

9. SAME. — There is no error in refusing instructions which were covered by other instructions which were given.

10. SAME. — Instructions which ignore important features of the case are properly refused as misleading.

11. SAME — TORTS — PLEADING. — Instructions are properly refused which present questions outside of the issues made by the pleadings. Under rule 71 of the rules of the Circuit Court in common-law actions, in actions for torts, the plea of not guilty operates as a denial of the breach of duty or wrongful act alleged to have been committed by the defendant and not of the facts stated in the inducement and no other defense than such denial is admissible under that plea. All other pleas in denial shall take issue on some particular matter of fact alleged in the declaration. Rule 72 provides that all matters in confession and avoidance shall be pleaded specially, as in actions on contract.

12. SAFE PLACE TO WORK. — It is not only the duty of the master to exercise ordinary care and diligence to provide a reasonably safe place in which the servant is to work, but to use ordinary care and diligence to keep it safe.

13. CARE IN USE OF ELECTRICITY. — Electricity is an invisible force, highly dangerous to life and property, and those who make, sell, distribute and use it are bound to use care in proportion to the danger involved.

(Syllabus by the Court.)

Error by defendant from a judgment in favor of plaintiff. *Affirmed.*

John E. Hartridge & Son, for plaintiff in error.

Alex St. Clair-Abrams, for defendant in error.

Opinion by HOCKER, J.:

On the 22d of September, 1903, the defendant in error, Lillian G. Sloan, hereinafter called the "plaintiff," sued the Jacksonville Electric Company, a corporation, in the circuit court of Duval county, Fla., for damages for the death of her husband, Henry

J. Sloan, alleged to have been caused by the negligence of the electric company on the 11th of August, 1903, in Duval county. A trial was had in January, 1906, and on the 11th day of that month a verdict was rendered in favor of the plaintiff for $14,000, and a judgment for that amount and costs was entered against the electric company on the same day. A writ of error was sued out from this judgment.

The declaration contained three counts and was as follows:

"Lillian G. Sloan, by Alex. St. Clair-Abrams, her attorney, sues the Jacksonville Electric Company, a corporation duly chartered and existing under the laws of the State of Florida, and having and usually keeping an office in Duval county, Florida, for the transaction of its customary business, for that, whereas, the plaintiff, Lillian G. Sloan, is the widow of Henry J. Sloan, and was on the 11th day of August, 1903, the lawful wife of the said Henry J. Sloan, and was supported and maintained by the labor of the said Henry J. Sloan, who as her husband was her sole and only support, and the plaintiff was then and had been ever since her marriage supported and maintained by the said Henry J. Sloan; and, whereas, on the 11th day of August, 1903, the said Henry J. Sloan, being then and there employed by the defendant, the Jacksonville Electric Company, to do certain work on certain pipes on the premises of said defendant, in the said city of Jacksonville, proceeded there to do and perform said work, and it was the duty of the defendant to provide for the said Henry J. Sloan a reasonably safe place in which to work. And the plaintiff further says that the said Henry J. Sloan, being then and there in and at the place where he was required to work, the defendant, failing and neglecting to keep said place of work in a reasonably safe condition, negligently and carelessly caused the electric power in said premises, and which was under the control and operation of the defendant, to be suddenly turned on, whereby and by reason of the sudden turning on of said electric power the deceased received an electric shock, from the effects of which electric shock the said Henry J. Sloan died. And the plaintiff says that by reason of the negligence of the defendant corporation in turning on said electric power her said husband was killed, and she was and is deprived of the protection and support of her said husband, and the care and maintenance of herself and of her infant child by her said husband have been cast upon her, to the great damage and loss of the plaintiff in the sum of $25,000. Wherefore the plaintiff brings this her suit and claims $25,000 damages.

"Second Count.

"For that, whereas, the plaintiff, Lillian G. Sloan, is the widow of Henry J. Sloan, and was on the 11th day of August, 1903, the lawful wife of the said Henry J. Sloan, and was supported and maintained by the labor of the said Henry J. Sloan, who as her husband was her sole and only support, and the plaintiff was then and ever since her marriage supported and maintained by the said Henry J. Sloan; and, whereas, on the said 11th day of August, 1903, the said Henry J. Sloan was employed by the Jacksonville Electric Company to do certain work on certain pipes in a pit or cellar on the premises of said defendant, and entered into said pit or cellar to do and perform said

work, and it was the duty of the defendant to provide for the said Henry J. Sloan a reasonably safe place in which to work. And the plaintiff further says that, the said Henry J. Sloan being then and there at a place where he was required to work, in and about said pit or cellar were certain electric wires pertaining to the premises and business of said defendant, and the plaintiff says it was the duty of the said defendant to keep and maintain said wires so protected and guarded that the electric power passing through them should not endanger the lives of the persons employed to work on said premises in said pit or cellar. And the plaintiff further says that the defendant knew, or could with reasonable care and diligence have known, that if any of said wires should be broken or should come in contact with any person working in said pit or cellar while charged with electricity it would cause death or great bodily injury. And the plaintiff further says that the defendant carelessly and negligently permitted a loose electric wire to become and remain charged with electricity, and said wire, coming in contact with the person of the said Henry J. Sloan, inflicted upon him an electric shock. from the effects of which electric shock the said Henry J. Sloan died. And the said plaintiff says that by reason of the negligence of the defendant corporation in turning on said electric power her said husband was killed, and she was and is deprived of the protection and support of her said husband, and the care and maintenance of herself and of her infant child by her said husband have been cast upon her, to the great damage and loss of the plaintiff in the sum of $25,000. Wherefore the plaintiff brings this her bill and claims $25,000 damages.

"Third Count.

"For that, whereas, the plaintiff, Lillian G. Sloan, is the widow of Henry J. Sloan, and was on the 11th day of August, 1903, the lawful wife of the said Henry J. Sloan, and was supported and maintained by the labor of the said Henry J. Sloan, who as her husband was her sole and only support, and the plaintiff was then, and has been ever since her marriage, supported and maintained by the said Henry J. Sloan; and, whereas, on the 11th day of August, 1903, the said Henry J. Sloan, being then and there employed by the defendant, the Jacksonville Electric Company, to do certain work on certain pipes in a certain pit or cellar on the premises of said defendant in the city of Jacksonville, proceeded there and entered said pit or cellar to do and perform said work, and it was the duty of the defendant to provide for the said Henry J. Sloan a reasonably safe place in which to work. And the plaintiff further says that the said Henry J. Sloan being then and there in and at the place where he was required to work, and there being in and about said pit or cellar certain electric wires, one of them became in such condition that it had to be repaired, and it became and was necessary, before such repairs could be made, to turn off the electric power from the wire so needing repairs. And the plaintiff says that the said power was temporarily turned off. And the plaintiff says that the defendant knew, or could with reasonable care and diligence have known, that if the electric power was turned on that said wire would become charged with electricity and would become a source of danger to the lives and persons of those engaged in working in said pit or cellar, and that it was the duty of the defendant to have kept said electric power from being turned on and through said wire until the work of repairing the same had been completed; but the plaintiff says

that the defendant negligently and carelessly, regardless of its duty in this regard, and without notice to the said Henry J. Sloan, or any person in said pit or cellar, suddenly turned, or caused to be turned, the electric power on and through said wire, and said wire, coming in contact with the person of the said Henry J. Sloan, inflicted upon him an electric shock, from the effect of which electric shock the said Henry J. Sloan died. And the plaintiff says that by reason of the negligence of the defendant corporation in turning on said electric power her said husband was killed, and she was and is deprived of the protection and support of her said husband, and the care and maintenance of herself and of her infant child by her said husband have been cast upon her, to the great damage and loss of the plaintiff in the sum of $25,000. Wherefore the plaintiff brings this her suit and claims $25,000 damages."

The defendant filed two pleas: First, not guilty; and, second, "that the injuries complained of were caused solely by the negligence of Henry J. Sloan, decedent, and not otherwise." There was a demurrer to the second plea, which was sustained by the court, and the defendant was granted leave to file "such additional plea as it may be advised;" but no other plea was filed, and the case was tried on the plea of not guilty.

After the evidence was closed and the arguments concluded, the defendant moved the court to instruct the jury to find a verdict for the defendant, which was refused, and an exception noted to the ruling.

The following charge to the jury was given by the trial judge of his own motion:

"Gentlemen of the jury, this is a suit for damages brought by the widow for the death of her husband, claimed to have been brought about by the negligence of the defendant. In the first place, gentlemen, the rule of evidence in this class of cases is that the plaintiff, in order to recover, must sustain the case made by a preponderance of the evidence. Again, if you should find for the plaintiff in the case, she would be entitled to what is known as compensatory damages; that is, such an amount as would compensate her for the loss of her husband, taking into account the amount she received from her husband during his lifetime, would probably receive during his probable life, which is fixed by certain tables, and also such amount as you in your judgment believe will compensate her for the loss of the association, care, and protection of the husband during the probable life of her husband, if her life probability is greater than that of the husband. Of course, when the life probability of the wife is less than that of the husband, it would be during her life probability; but there is testimony in this case as to one probability only, or two probabilities, and both of those give the probability of the life of the wife greater than that of the husband. So you will be guided by the life probability of the husband. You, gentlemen, are the sole judges of the testimony, the credibility of the witnesses, and the weight to be attached to the testimony of any witness or set of witnesses.

It is your province, your sole province, to pass upon the disputed issues of fact, and in doing this, gentlemen, you should, if you can, reconcile all the testimony of all the witnesses, so as to make them all speak the truth. If you cannot do this, and you find a conflict as to material matters between the witnesses, then it becomes your duty, under your oaths as jurors, to decide which witness or set of witnesses have testified truthfully, and form your verdict on the testimony you believe to be true. In weighing the testimony of the witnesses, you should, gentlemen, take into consideration the position of the witness at the time of the giving of his testimony and at the time of the happening of the event testified about; the bias or prejudice, if any, of the witness, as may be exhibited on the stand before you; the manner of the witness in the giving of his testimony, as to whether he is a reluctant or a forward witness; the intelligence of the witness, or the contrary, in order that you may judge of his observations and the correctness of them, and whether or not he can intelligently detail what he has observed; his interest in the result of his testimony, if any; the reasonableness, or otherwise, of his testimony, as judged by your common everyday experience; the contradictions in the testimony of the witness himself or the testimony of other witnesses whom you believe to have testified truthfully. And, in fact, gentlemen, all the circumstances surrounding the witness bearing upon his credibility are proper for your consideration in arriving at what weight you will attach to his testimony. Of course, gentlemen, you must do this carefully, fairly, and impartially under your oaths as jurors, with the purpose in view, as nearly as you can, of reaching the facts of the particular case on trial before you. Now the right, gentlemen, of this plaintiff to recover, is based upon the negligence of the defendant, or its agents or servants, which negligence caused the injury complained of. 'Negligence,' gentlemen, has been defined as the leaving undone of something that a reasonably prudent person under similar circumstances would do, or the doing of something which a reasonably prudent person would not do. That is negligence. It is a question of fact for you to find from the testimony. Now, if you find for the plaintiff, the form of your verdict is: 'We, the jury, find the defendant guilty and assess the damages' at what you find would be proper compensation under the rules that I have given you. If you find for the defendant, the form

"(4) The court instructs the jury that a servant entering into a dangerous employment assumes such risks as are ordinarily incident to the employment from causes open and obvious to the employee, the dangerous character of which he had opportunity to ascertain, and he must exercise reasonable care and caution for his own safety while engaged in the employer's service. So, if you believe from the evidence that the danger of receiving a shock while splicing a broken electric wire was open and obvious to Henry Sloan, or a danger the character of which he had the opportunity of ascertaining, and he failed to exercise reasonable care and caution for his safety while engaged in the work, and by reason thereof received a shock from which death ensued, then the plaintiff cannot recover in this cause, and your verdict should be for the defendant."

"(12) If you believe from the evidence in this case that Henry Sloan, the plaintiff's decedent, died from heat exhaustion or any disease superinduced by physical weakness, extreme heat, and excitement, or any other natural cause, then the plaintiff cannot recover in this case, and your verdict should be for the defendant.

"(13) In all departments of life, where labor is employed and the relationship of master and servant or of fellow servants or coemployees exists, it is the right of each to treat the other as normal as to health and condition until the contrary is made to appear, and, in the case of master and servant, until the contrary is brought to the attention of the master. So, if you believe from the evidence in this case that the current at the power house passing through the wire that Sloan is alleged to have come in contact with was a direct current, as distinguished from the alternating current, and that the entire voltage of the current of which the plant was capable, and which was possible to be transmitted through said wire by the equipment of the plant, could be taken by an ordinary normal person without causing serious injury, and that through the negligence of another employee the current was turned on and Sloan received the same, and that, owing to his being a physically weak man or other physical defect, it caused his death, and but for such weakness or physical defect the shock would not have killed him, and that his condition of weakness or physical defect was unknown to the master, then the plaintiff cannot recover in this case, even though his death was caused by the electric current so turned on, and your verdict under such a condition should be for the defendant.

"(14) One of the defenses set up by the defendant in this case is that Henry Sloan was not killed by an electric shock, but that he died from a natural cause; and, it being a question of dispute as to the cause of death, no presumption of negligence arises against the defendant on the mere proof of his death. It is to be decided like any other question arising in a civil suit. So, before you can reach a conclusion under the law that Henry Sloan was killed by an electric shock, or any electric current, such fact must be established by the plaintiff by a preponderance of evidence. So, unless you find that it is established by a preponderance of the testimony that Henry Sloan was killed by an electric shock, your verdict should be for the defendant; and if, on the contrary, you find from a preponderance of evidence that the death of Henry Sloan was caused by an electric shock, then the question will arise, for your investigation, as to whether the electric shock was caused by the negligence of an employee of the defendant; and, if you so find, then

you should further investigate as to whether Henry Sloan by any act of commission or omission contributed to bringing about the act, as, under the law, one fellow servant cannot recover damages from the master for the act of another fellow servant, unless he himself is free from blame; and if you find from the evidence that Henry Sloan, by his negligence, contributed to bringing about the accident, then he could not have recovered if he had lived, and his widow cannot recover under such circumstances, as his survivor claiming a right of action, and your verdict should be for the defendant.

"(15) Before you can find a verdict for the plaintiff in this case, you must find from a preponderance of the evidence that Henry Sloan came to his death solely from an electric current transmitted by a wire of the defendant and from no other cause, and that the current had been turned on by the negligence of a co-employee, and that Sloan himself was absolutely free from negligence; that is to say, did not in any way contribute by his own negligence to bringing about the accident. For, if you find from the evidence either that Henry Sloan died from heat exhaustion or from any natural cause, the plaintiff cannot recover, or if you find that he did not die from a natural cause, but died from an electric shock, and further find that he in any way contributed by his own carelessness, negligence, or act to his receiving the electric shock that caused his death, then the plaintiff cannot recover, and your verdict should be for the defendant.

"(16) No recovery can be had for the death of any one caused by the wrongful act, negligence, carelessness, or default of another, unless the wrongful act, negligence, carelessness, or default from which the death ensued was such as would have entitled the deceased person to a recovery of damages, had death not ensued. If, for any reason, the deceased person would have been defeated or barred from recovery, had he been alive and suing for personal injuries only, then the same reason or cause for his bar or defeat will bar and defeat a recovery for his death by any one suing on that behalf.

"(17) Under the provisions of the statute under which this suit is brought the plaintiff, Mrs. Sloan, cannot recover damages from the Jacksonville Electric Company for the death of Henry Sloan on account of the negligence or carelessness of another employee, unless Henry Sloan was wholly without fault himself, even though in performing the act that resulted in his death he was acting under the orders of a superior. So, if you find from the evidence in this case that there was negligence upon the part of a co-employee in turning on the current, and that that negligence was the cause of the death of Henry Sloan, still his widow could not recover from the defendant, if you further find from the evidence that Henry Sloan was not wholly without fault himself. In other words, if Henry Sloan by his negligence contributed to the bringing about of the accident, and you so find from the evidence that caused his death, the plaintiff, the widow, cannot recover in this case, and your verdict under such conditions should be for the defendant.

"(18) If you find, under the above instructions, that Henry Sloan and the defendant were both guilty of negligence whch contributed to bringing about the accident to Henry Sloan, then the plaintiff cannot recover herein, and you will find for the defendant. If you find that neither Henry Sloan nor the defendant was guilty of such negligence, then you will also find for the defendant.

"(19) The court instructs the jury that it is not enough to say or find

that there is some evidence of negligence on defendant's part. A scintilla of evidence, or a mere surmise, that there may have been negligence on the part of the defendant, will not warrant the jury in finding a verdict for the plaintiff. There must be evidence upon which the jury can reasonably conclude that there was negligence."

At the request of the plaintiff the following instructions were given, viz.:

"(1) In a case of this kind circumstantial evidence is admissible to prove or to disprove any of the facts in issue, and it is the duty of the jury to take into consideration the circumstances admitted in evidence which have a proper bearing on the case.

"(2) It is the duty of an employer to provide a reasonably safe place for employees to work in. In case of an electric company, which uses wires charged with electricity of such voltage as to be dangerous to human life or to be capable of inflicting great bodily harm, it is the duty of such company to see that the wires are kept reasonably safe from injuring any person employed in working on and about them.

"(3) A company maintaining electric wires over which a high voltage of electricity is conveyed, rendering them highly dangerous, is under the duty of using the necessary care and prudence, at places where others may have a right to go, to prevent injury."

"(5) Corporations act and perform their duties through the agency of their servants and employees. Where it is a duty of a corporation to perform an act, and the authority to do that act is imposed upon one of its employees, such employee stands in the place of and as a representative of the corporation, and the corporation is responsible for the negligence of the officer or agent charged with the performance of such duty.

"(6) If the jury believe from the preponderance of the evidence that on the day of the death of Henry J. Sloan he was employed by the defendant, Jacksonville Electric Company, and that he was at work for said company at the request of another employee who was in charge of the work of repairing a broken electric wire, in the place in which it is alleged that he received the electric shock from which it is further charged he died, then I charge you that he was not a trespasser on the premises of the defendant, nor a mere licensee, but that he was lawfully where he was and in the employ of the defendant."

"(8) If you believe from the preponderance of the evidence that on the day Henry J. Sloan died he was employed by the defendant and was in the service of the defendant, engaged in repairing or doing work on certain pipes in a pit or place where there are electric wires, usually charged with electricity of a high voltage; and if you further believe from the preponderance of the evidence that shortly before his death another employee of the defendant came to him into the pit or place, and requested him (the deceased) to help him in repairing a broken wire; and if you further believe from the preponderance of the evidence that this employee had authority in the premises — then I charge you that, if the deceased consented to aid him in said work, the deceased was for the time being a servant of the defendant, while engaged in assisting in the work, and was entitled to the same protection as the other employees and servants."

"(10) A person killed by an electric shock, or from any other cause, resulting from the negligence of another, is presumed in law to have been in the exercise of reasonable care for himself, unless it is shown by a preponderance of evidence that he knew of the danger and carelessly and negligently risked his life or person by some act of omission or commission on his part."

"(12) If you believe from the preponderance of the evidence that on the 11th day of August, A. D. 1903, Henry J. Sloan was in the employ of the Jacksonville Electric Company, and was on the premises of said company in a pit or place where pipes were, engaged in working for said company on said pipes; and if you further believe from the preponderance of the evidence that in the place where he was working were a number of electric wires used by the company in its business; and if you further believe from the preponderance of the evidence that while the deceased was there engaged in his work another employee of the company came to the place where the deceased was, and requested the deceased to aid him in repairing a wire; and if you further believe from the preponderance of the evidence that the deceased consented to aid him in repairing the wire, and that the deceased and another employee went to work thereon; and if you further believe from the preponderance of the evidence, whether direct or circumstantial, that the deceased held and worked on one end of the wire, holding the same in his hands for some minutes before his death without injury to himself, and that suddenly there was a flash, and the deceased fell, and a few minutes thereafter died; and if you further believe from the preponderance of the evidence that shortly before this the cars propelled by the electricity of the defendant had stopped running, and at the expiration of some minutes the electric current was turned on the wires again; and if you further believe from the preponderance of the evidence that the wires in the pit or place where the deceased was engaged were connected with the wires which propelled the electric cars of the defendant; and if you further believe from the preponderance of the evidence, whether direct or circumstantial, that while the deceased was holding the electric wire in his hands the electric current was suddenly turned through the wires, and that no notice or warning was given to the deceased; and if you further believe from the preponderance of the evidence that the deceased met his death from an electric shock, and that the deceased was without fault

"(14) In a case of this kind you have a right to take into consideration in timating the pecuniary loss of the plaintiff, if you believe she is entitled to mages, her loss of the comfort, protection, and society of her husband, in e light of all the evidence in the case relating to the character, habits, and nduct of the deceased as her husband, and to the marital relations between e parties at the time of and prior to his death. She is also entitled to re-ver reasonable compensation for the loss of support which her husband was gally bound to give her, based upon his then and probable future earnings d acquisitions, to be estimated on the basis of his health, age, business pacity, habits, experience, and knowledge; all these elements to be based pon the probable joint lives of the plaintiff and her deceased husband, the m total to be reduced to a money value, and its present worth given as mages. Within these limits you have a right to exercise a reasonable dis-etion as to the amount to be awarded, based upon the facts in evidence.

"(15) If you believe from the preponderance of the evidence that the de-ased at the time of his death was thirty-eight years of age and was in good alth, and had a life expectancy of twenty-nine years, and that of his earn-gs his wife received from him for her own support and use an average of 16 per week, or $832 per annum, then the first element of damages it is ur duty to consider is what sum capitalized should be awarded to her, hich would give her the sum of $832 per annum and exhaust the entire mount awarded at the end of twenty-eight or twenty-nine years of the life pectancy of the deceased. This amount you have a right to find from the idence, if evidence has been given you fairly approximating the sum to which e would be entitled, based upon his life expectancy and the sum he con-ibuted to her support. In addition to this sum you have a right to con-der what compensation she is entitled to for the loss of the society, protec-on, and comfort of her husband, as I have already charged you. The sum be awarded to the plaintiff, if you decide she is entitled to damages for e loss of the society, protection, and comfort of her said husband, must ecessarily be largely within your discretion within the limits I charge you . And in considering this question you have a right to consider whether or t he was a kind, affectionate husband, attentive to his wife and the marital lations between them, in accordance with the evidence given on these bjects."

"(18) You are the sole judges of the weight of the testimony and the cred-ility of the witnesses. You have a right to consider the interest of any itness in his or her relation to either the plaintiff or defendant, and to re-ect all testimony that you believe untrue or unreasonable."

The first, second, sixth, and seventh assignments of error are ot before us for consideration.

The third assignment of error is:

"The court erred in the admisson of the testimony of M. E. Fretwell to rove that 500 voltage of direct current in case of a grounded circuit would e fatal."

M. E. Fretwell, a witness for the plaintiff, was an electrician f seventeen years' experience, employed by the city electric light

department of Jacksonville, and there was evidence tending to show that a direct current of 500 voltage of electricity had passed through Sloan while wet with perspiration, standing on the damp ground, holding the wire in his hands. The record on page 193 shows that the plaintiff's attorney propounded the following question: "Would your study warrant you in stating whether or not a direct current of 500 voltage, suddenly turned upon a wire held in both hands by a person standing on the damp ground, wet with perspiration — what effect that would have upon it?" Mr. Hartridge, for the defendant, objected to this question on the ground that there is no evidence here to show what the voltage was in the wire, or that M. E. Fretwell had ever made a study of electricity. The court permitted the witness to answer the question, to which ruling an exception was noted for the defendant. The witness answered: "In the case of a grounded circuit, I would consider that fatal." There was further explanation made, and no motion made to strike the answer. The sole contention here is that the answer took into consideration a grounded circuit, which was wholly outside of the case. There is no contention that the question called for such an answer. He was asked if his study would warrant his answering the question. We are not shown in what respect the question was objectionable, and in the light of the whole testimony it seems to us to have been proper. No error is properly presented by this assignment.

The fourth assignment of error is:

"The court erred in the admission of the testimony of M. E. Fretwell to prove that he took all precautions possible in repairing broken wires."

This question was objected to on the ground that what the witness would do or what precautions he would take could not be considered; that it was a question of what was done at the time of the accident, whether that was proper or not. The judge overruled the objections, and an objection to the ruling was noted. The witness answered: "I always take all precautions possible." Electricity is recognized as a dangerous agency, whose characteristics are not matters of common knowledge. Mr. Fretwell was by occupation an electrician, having seventeen years' experience, and could properly be expected to have a special knowledge of those matters. It seems to us the question, under the circumstances of this case, was proper, and especially as the examination

of this witness is given in two places in the same bill of exceptions, and in one of those places it appears that the question objected to was changed by the court itself, so as to ask the witness whether precautions were necessary. The witness answered, 'I consider them so." There was no objection to this question, or to the answer.

The fifth assignment is:

"That the court erred in refusing to admit the testimony of W. H. Tucker on the part of the defendant to show the physical condition of Henry J. Sloan, from his own statement, and that he had complained of the heat and his weak physical condition on the morning of the day of his death."

Mr. Tucker was the manager of the defendant company at the time of Sloan's death, knew him well, and testified that he had several conversations with him during the morning preceding the afternoon when he died. He was then asked the question involved in this assignment. In neither of the voluminous briefs filed in this case by the respective parties, citing 250 authorities, are we referred to one showing the assignment to be either valid or invalid. So far as we are advised, the question whether the declarations or admissions of the deceased in a suit like the present one, brought by the wife for her own benefit under our statutes (§§ 2342, 2343, Rev. St. 1892), are admissible in evidence, and, if so, under what circumstances and to what extent, has never been decided by this court. We are inclined to think, from such an examination of the authorities as we have been able to make, that such declarations or admissions are inadmissible in an action brought by the widow of the deceased, and are to be regarded as other hearsay evidence, unless they are made under such circumstances as to be a part of the *res gestæ*. Tiffany, Death by Wrongful Act, § 194; *Bradford City v. Downs,* 126 Pa. 322, 17 Atl. 884; *Camden & A. R. Co. v. Williams,* 61 N. J. Law, 346, 40 Atl. 634; *Pennsylvania Company v. Long,* 94 Ind. 250. It is suggested, without decision, that possibly a different rule would apply where the action was brought by the executor or administrator of the deceased for the benefit of his estate. 2 Wigmore on Ev., § 1081 (1).

The eighth assignment of error questions the correctness of the instruction numbered 8 given by the trial judge on behalf of the plaintiff. The objection urged against this instruction is that

it gave the jury to understand that a volunteer for a hazardous service does not assume the element of risk involved in the work undertaken. The principal authority cited to maintain this contention is 4 Thompson's Commentaries on the Law of Negligence, §§ 4678–4679. It will be seen, by an examination of the whole article devoted by Thompson to a discussion of the subject of "Risks of Danger Outside of the Scope of Employment," that there is no absolute rule, applicable to all cases, by which to determine the question of the liability of the master to the servant where the servant is injured in consequence of being ordered by the master or his representative to perform a duty which he had not undertaken by the contract of service, but that the question will depend upon the circumstances of each particular case. Id. § 4675. In section 4676 the author says:

"There is a general concurrence of authority in support of the conclusion that where the master orders the servant into an employment outside the scope of the duties which the servant has contracted to perform, which employment is attended with dangers unknown to the servant and not open to his observation, and which are not discoverable by him by means of such as inspection as he has time and opportunity to make, and gives him no instructions with respect to such dangers, and he is injured in consequence of so entering upon the new service, he is not deemed to have accepted the risk of such dangers, but he may recover damages from the master for the injury."

To bring himself within this rule the servant must be acting upon orders or at the request of the master, or of some other employee who has authority to give the order or to make the request. Section 4677. Again, the author says in section 4682:

"Emergencies frequently arise where the servant, quitting his regular em-

the machinery was located. A wire over which the electricity was transmitted that operated the defendant's trolley cars ran through this basement. In the afternoon of that day it broke or was burned in two, and the trolley cars stopped running. The line foreman of the defendant company, L. T. Smith, whose duties were to repair the lines and "most anything that came up," requested Henry J. Sloan to assist in mending or splicing the wire, which was then a dead wire; that Sloan did assist, and while holding in his hands the ends of the broken wire, upon which the line foreman was working, a 500 voltage current of electricity was suddenly and without notice to Sloan turned on the wire and passed through Sloan, causing his death. From this standpoint we do not think that Sloan could be regarded as a mere volunteer, and we do not consider the instruction obnoxious to the objections made. *Johnson v. Ashland Water Company,* 71 Wis. 553, 37 N. W. 823, 5 Am. St. Rep. 243.

The ninth assignment is based on the tenth instruction given on behalf of the plaintiff. It is insisted that this instruction is misleading and does not state the law correctly. No authority is cited to sustain this contention. In this State, in a suit like the instant one, the burden of pleading and proving negligence on the part of the plaintiff is upon the defendant. *Louisville & Nashville Railroad Co. v. Yniestra,* 21 Fla. 700; *City of Orlando v. Heard,* 29 Fla. 581, 11 So. 182; *Morris v. Florida Cent. & P. R. Co.,* 43 Fla. 10, 29 So. 541. The law as stated in the instruction is supported by the following authorities. *Flynn v. Kansas City, St. Joseph & Council Bluffs R. R. Co.,* 78 Mo. 195, 47 Am. Rep. 99; *Reading & Columbia R. R. Co. v. Ritchie,* 102 Pa. 425; *Parsons v. Missouri Pac. Ry. Co.,* 94 Mo. 286, 6 S. W. 464.

Assignment No. 10 is based on the giving of instruction No. 12 for the plaintiff. The objection to this instruction is that it conveyed to the minds of the jury the judge's opinion as to what inferences of fact should be drawn from any particular fact, that it is argumentative and that there was no evidence to show that Sloan was solicited to participate in the work of mending a broken wire.

William Carter, a witness for the plaintiff, testified that he was working with Sloan on the 11th of August, 1903, in the base-

ment of the power house, and heard Smith, the line foreman, tell Sloan he wanted him to help him connect a wire, and that he then saw Smith and Sloan working with the wire, trimming it; that Sloan was holding the wire, and that a flash from the wire came and Sloan fell. The evidence clearly shows that Sloan fell unconscious and died in a few moments thereafter. It is not contended that any other fact was hypothesized in this charge of which there was no evidence. We discover no error in the instruction. *Kelly v. State,* 44 Fla. 441, 33 So. 235.

Assignment No. 11 is based on instruction No. 13 given at plaintiff's request. The contention is that there is no evidence that Henry J. Sloan died from an electric shock, that the evidence shows that he was a mere volunteer, that any work he did on the wire was without request and voluntary, and that there was no evidence that he was free from fault. As to the last contention, there is no plea setting up the negligence of Sloan. Therefore such negligence, if any, was not in issue, and the charge in this respect was more favorable to the defendant than it had a right to ask, and consequently of this feature the defendant cannot complain. As to the contention that there is not a syllable of testimony which shows or tends to show that Henry J. Sloan died from an electric shock, we are of opinion that it is untenable. There was evidence tending to show that Sloan on the 11th of August, 1903, was in the employment of the defendant as a pipe fitter; that he was in fairly good health; that he worked all the morning in the basement of defendant's power house; that he quit work at noon and returned after dinner; that he was apparently in good health; that the basement was a very warm, damp place, having a temperature of 120 degrees, but it does not appear that Sloan or any one had ever been overcome by heat of the place; that Sloan was requested by Smith, the line foreman having charge of the repairing of the wires of the company, to assist him in repairing the broken wire, which was then a dead wire, and which transmitted electricity from the generator to the trolley lines; that he did assist Smith, and while holding the ends of the broken wire the electric current of about 500 voltage was suddenly and without notice to Sloan turned on the wire; that there was a flash of fire, and Sloan fell unconscious and died in a few moments; that the place was damp, and Sloan was standing

on the damp ground; that under such circumstances the current would pass through the body of Sloan; that such a voltage of electricity under such circumstances is sometimes fatal. If the jury believed this evidence, and it was for them to say whether they believed it or not, they might well find that Sloan died from the electric shock, and that he was not a mere volunteer, to whom the company owed no duty, except that of humanity. The fact that the testimony of the defendant contradicted that of the plaintiff does not make the instruction improper.

Assignment No. 13 is based on instruction No. 15 given at plaintiff's request. The contention is that this instruction does not require as a condition precedent that the plaintiff should be entitled to recover before fixing the amount of recovery; in other words, that it assumes the right of recovery. If this instruction was intended to be taken by itself, separate and apart from the other charges and instructions given to the jury, it would be obnoxious to the criticism which is made. The trial judge, however, was careful to say to the jury that each and all of the charges and instructions, both his own and those given at the request of the plaintiff and defendant, were to be taken by the jury as constituting the law of the case. In his own charge he informed the jury "that the plaintiff, in order to recover, must sustain the case made by a preponderance of the evidence." To the like effect was the first instruction given at the request of the defendant. In a number of cases this court has held that in determining the correctness of charges they should be considered as a whole. *Knight v. State,* 44 Fla. 94, 32 So. 110; *Mathis v. State,* 45 Fla. 46, 34 So. 287; *Gray v. State,* 42 Fla. 174, 28 So. 53; *Richards v. State,* 42 Fla. 528, 29 So. 413. The instruction objected to was intended simply to guide the jury in determining the amount of the damages, and it is not contended that from this standpoint it was illegal or improper. Taking the charges and instructions as a whole, we do not think the jury could have been mislead by this particular one.

Assignment No. 14 is based on the refusal of the trial judge at the request of the defendant to instruct the jury to find a verdict for it. As we are of opinion there was evidence in this case upon which the jury, if they believed it, could properly find a verdict for the plaintiff, there was no error in refusing this peremptory instruction.

Assignments Nos. 15 and 16 are based on the refusal of the court to give instructions Nos. 3 and 5 requested by defendant. These instructions were to the effect that Sloan assumed the risks ordinarily incident to the service in which he was engaged, and, if proper at all under the evidence in the case, were fully covered by instruction No. 4 given at the request of the defendant.

Assignments Nos. 17 and 18 are based on the refusal of the court to give instructions Nos. 6 and 7 requested by the defendant. No. 6 is as follows:

"Under the law, a master is required to exercise ordinary and reasonable care to provide a reasonably safe place for the servant to do the work he is engaged to perform; and if you find from the evidence in this case that the place provided for Henry Sloan to work in was reasonably safe for the work he was engaged to perform, and that his death was caused by reason of the character of the place in which he was working, then the plaintiff cannot recover in this case, and your verdict should be for the defendant."

No. 7 was the counterpart of the foregoing, and was to the effect that if the place in which Sloan was to work was not reasonably safe, and he became acquainted with it, it was his duty to leave the employment of the master, and if he did not do so, and was injured by reason of the place not being reasonably safe, his widow is not entitled to recover. The vice of these two instructions is that they ignore the case made by the declaration and the evidence. The right of the plaintiff to recover does not depend alone upon the question whether the place in which he was injured was ordinarily safe or unsafe. The gist of the case of the plaintiff is that her husband was killed by a current of electricity suddenly and without notice turned into a dead wire he was assisting in splicing upon the request of the line foreman. There was no evidence to show that the place in which this is alleged to have happened was ordinarily unsafe. The instructions ignored these features of the case and were properly refused. In the case of *Florida Ry. & Nav. Co. v. Webster,* 25 Fla. 394, 5 So. 714, this court held:

"It is proper to refuse instructions, as misleading, when they are based on the theory of a party as to facts in evidence, and ignore the legal effect of other facts applicable to the relation and rights of the parties."

The nineteenth assignment is based on the refusal of the court to give instructions No. 9 requested by the defendant. It is as follows:

"If you believe from the evidence in this case that Henry Sloan, through the negligent turning in of the electric current while he was at work splicing a broken wire, received an electric shock that caused his death, and that the current of electricity was not received by direct contact with the wire, but was received by contact with L. T. Smith, through whose body the current passed to reach him, then the plaintiff cannot recover under the pleadings in this case, and your verdict should be for the defendant."

It is contended that, if the facts were as predicated in this instruction, there would be a fatal variance between the declaration and the proof, and the plaintiff could not recover. It is sufficient to say, in regard to this contention, that the first count of the declaration does not allege that Sloan was killed by direct contact with the wire. It alleges that the "defendant, failing, etc., negligently and carelessly caused the electric power in said premises, and which was under the control and operation of the defendant to be suddenly turned on, whereby and by reason of the sudden turning on of said electric power the deceased received an electric shock, from the effects of which electric shock the said Henry J. Sloan died." Even if it be true that Sloan received the shock through Smith, there is no variance between this count and the evidence.

The twentieth assignment is based on the refusal of the court to give instruction No. 10 requested by the defendant. What we have said with reference to the seventeenth and eighteenth assignments is applicable to this, and it was properly refused.

The twenty-first assignment is based on the refusal to give instruction No. 11. The gist of this is that under the circumstances of this case it was Sloan's duty to give notice to the persons in charge of the machinery of the defendant that he was about to engage in the dangerous work of splicing the broken wire. Whether such action on his part was necessary it is unnecessary to inquire. There was no plea in the case setting up such negligence of Sloan. The only issue before the jury was the negligence of the defendant, which was raised by the plea of not guilty, the only plea interposed by the defendant. Rule 71 of the rules of the Circuit Court in common-law actions provides that:

"In actions for torts the plea of not guilty shall operate as a denial of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defense than such denial shall be admissible under that plea. All other pleas or denial shall take issue on some particular matter of fact alleged in the declaration."

And rule 72 provides "all matters in confession and avoidance shall be pleaded specially as in actions on contract." *Louisville & Nashville Railroad Co. v. Yniestra,* 21 Fla. 700; *City of Orlando v. Heard,* 29 Fla. 581, 11 So. 182; *Morris v. Florida Cent. & P. R. Co.,* 43 Fla. 10, 29 So. 541.

The twenty-second assignment is based on alleged error in the overruling of the motion for a new trial. The only grounds of this motion argued here are, first, that there is no evidence to show any negligence upon the part of the defendant; and, second, that there is no evidence that the death of Henry J. Sloan was caused by an electric shock. In 2 Cooley on Torts (3d ed.), p. 1102, there is a very succinct statement of the law relating to a master's responsibility to a servant. The author says these duties have been very comprehensively stated in a recent case as follows:

"It is the personal and absolute duty of the master to exercise reasonable care and caution to provide his servants with a reasonably safe place to work, reasonably safe tools, appliances, and instruments to work with, reasonably safe materials to work upon, suitable and competent fellow servants to work with them, and to make needful rules and regulations for the safe conduct of the work; and he cannot delegate this duty to a servant of any grade, so as to exempt himself from liability to a servant who has been injured by its nonperformance. Whoever he intrusts with its performance, whatever his grade or rank, stands in the place of the master, and he is liable for the negligence of such employee to the same extent as if he had himself performed the act or been guilty of the negligence."

See *Mast v. Kern,* 34 Ore. 247, 54 Pac. 950, 75 Am. St. Rep. 580, and instructive note on page 584, where the fellow-servant doctrine is learnedly discussed, and where it is stated to be law that it is the nature of the duty intrusted to an employee or the capacity in which he acts, and not his grade or rank, which determines the liability of a master.

It is not only the duty of the master to exercise ordinary care and diligence to provide a reasonably safe place in which the servant is to work, but to use ordinary care and diligence to keep it safe. 2 Cooley on Torts (3d ed.), 1112–1113. In the same volume, on page 1492, it is said:

"Electricity is an invisible, impalpable force, highly dangerous to life and property, and those who make, sell, distribute, use, or handle it are bound to exercise care in proportion to the danger involved."

We do not deem it necessary to go into an examination of the numerous cases illustrating and enforcing the foregoing principles. Whatever qualifications they may have have no application to the facts of this case. Applying them to the facts which we have heretofore stated the evidence tended to prove, we cannot doubt that it was the duty of the defendant to use reasonable care to see that the current of electricity was not turned upon the wire while the employees of the defendant were working upon it in order to splice it. The evidence does not show that any care or precaution of any sort was taken by the defendant. It seems to us clear that the jury were warranted in finding that the defendant was negligent. As to whether Sloan's death was caused by an electric shock, there was a conflict in the evidence. Some of the expert witnesses testified that a 500 direct current voltage, such as is used on trolley lines, was comparatively harmless. One of the experts, Mr. Nash, introduced by the defendant, testified that he had only known of two deaths produced by such a voltage. Dr. Perry, a witness for the defendant, testified that he was called to see Sloan on the day he died, immediately after he was taken out of the power house; that he did not know him before that time; that he examined his body at the undertaker's some hours after he died; that he found scars on his person, indicating that he had tertiary syphilis; that he was emaciated, and in the witness's opinion he died from heat exhaustion. Another physician, who testified for the defendant, stated on cross-examination that he had known Sloan for sixteen years; that when he first became acquainted with him he was suffering from grippe, which resulted in tuberculosis; that he advised him to change his climate, and Sloan went away and was gone some years; that he had been his physician since his return to Jacksonville; that he had had sores on his legs which were the result of cold and burns; that he had never observed any symptoms of syphilis; that he had had no serious sickness in several years. Several witnesses who knew Sloan testified that he was about the time of his death, and had been for some time, in fair health; that he lost little or no time from work; and his brother testified that, while thin from working in a warm place, he was very muscular and strong. There was no autopsy upon the body of Sloan, and the jury were left to determine the cause of his death without the

aid of such an investigation. If Sloan was in reasonably good health, and there was evidence to that effect, it seems somewhat remarkable that death should have come upon him from heat exhaustion, at the very moment when a current of electricity was passed through his body, which the evidence also tended to prove. We think the question whether Sloan was killed by an electric shock was, under the evidence in the case, one entirely for the determination of the jury. *Mahan, Adm'r, v. Newton & Boston Street Ry. Co.*, 9 Am. Electl. Cas. 508, 189 Mass. 1, 75 N. E. 59.

We find no reversible error in the record, and the judgment of the lower court is affirmed, at the costs of the plaintiff in error.

TAYLOR and PARKHILL, JJ., concur.

SHACKLEFORD, C. J., and COCKRELL and WHITFIELD, JJ., concur in the opinion.

GRAVES v. WASHINGTON WATER POWER CO.

Washington Supreme Court — Dec. 13, 1906.

44 Wash. 675, 87 Pac. 956.

1. CARE IN USING ELECTRICITY. — The law imposes on persons manufacturing and dealing in or handling electricity the duty of exercising the highest degree of care to protect persons from danger in all places where the general public may rightfully go for purposes of business or pleasure.
2. SAME — INJURY TO BOY BY CONTACT WITH WIRE — TRESPASSERS. — A boy injured by coming in contact with a live wire while climbing on a pier of a public bridge cannot hold the electric company liable for damages where he was a trespasser and was not in a place where the public might rightfully go for purposes of business or pleasure.
3. DUTY TO AVOID CHARGED WIRES. — Where an electric company maintains dangerous electric wires in a public place, it does not constitute an invitation to take hold of, or come in contact with them. When a person

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Maintenance of Electric Wires over Public Bridge. — An electric company in stringing its wires along the trusses of a public bridge is bound to consider all the uses to which the bridge is accustomed to be put. Where such a bridge was frequently used by boys in the neighborhood to dive from and an electric light company erected its wires over and along said bridge, and the bridge was used thereafter in the same way by boys bathing in the stream, and the wires of the company were not insulated, and there was no notice given that such wires were dangerous, and a boy while preparing to dive in the stream was killed by an electric shock from one of such wires, it was held that the facts were sufficient to establish the negligence of the defendant electrical company in the erection and maintenance of wires. *Nelson*

rightfully or wrongfully in such a place sees a wire which he knows may be highly dangerous, it is his duty to avoid coming in contact therewith.

4. PLACES ATTRACTIVE TO CHILDREN. — The fact that a public bridge and the piers thereof and the immediate surroundings and the presence of pigeons rendered the place attractive to children, does not render an electric light company liable for injuries received by a boy coming in contact with a live wire while climbing over the pier.

5. ANTICIPATION OF INJURY. — An electric light company cannot be said to have anticipated that a boy would climb up a pier of a public bridge and reach over and take hold of electric wires strung upon its poles thirty feet from the ground.

Appeal by defendant from a judgment in favor of plaintiff. *Reversed.*

H. M. Stephens, for appellant.

O. C. Moore and *F. T. Post,* for respondent.

Opinion by ROOT, J.:

This appeal is from a judgment against appellant for personal injuries sustained by respondent, a boy of fifteen years of age. The complaint sets forth that respondent was injured by reason of contact with the wires of appellant, which were charged with electricity; that the power house of appellant is immediately east of what is known as the "Monroe street bridge," which spans the Spokane river, and connects Monroe street on the north and south sides of said river; that said bridge is a public thoroughfare, and is the property of the city of Spokane; that the driveway, roadway, and footpaths of said bridge are at the height of about 100 feet from the water in said river; that said bridge is supported by piers built by means of plates of steel at a slight angle, with strips to and from such plates, set at an angle, so that the same

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v. Branford Lighting & Water Co., 8 Am. Electl. Cas. 542, 75 Conn. 548, 54 Atl. 303.

Maintenance of Wires over Viaduct. — An electric company laid its wires on the viaduct of a city street, outside, but close to the traveled way, between which wires and way there was a railing or balustrade over which small boys were in the habit of playing and getting close to the wires. The wires were defectively insulated, of which fact and of the habit of the boys the company had knowledge. One of the boys when in the act of climbing was killed by coming in contact with the uninsulated wires. It was held that the electric company was liable. *Consolidated Electric Light & Power Co. v. Healy*, 8 Am. Electl. Cas. 548, 65 Kan. 798, 70 Pac. 884.

can be used as a ladder, which alleged ladders are inviting and attractive to small boys to climb and play thereon; that some of said piers and alleged ladders are near the power house of appellant; that appellant's electric wires are in close proximity to one of said piers; that by reason of the construction of said piers in said ladder-like form, in close proximity to said river, and that at certain seasons of the year pigeons are in the habit of nesting and rearing their young on the beams and around the top of said bridge, said bridge and the supports thereof were attractive to small boys, and that small boys frequented same for playing and climbing thereon, and had done so for a long time, and that appellant knew, or should have known, thereof. It is further alleged that on March 10, 1905, respondent climbed one of said piers, and, when about thirty feet high, something touched his coat, and he involuntarily put out his hand, and took hold of a live wire, and received the shock and injury complained of, and that as respondent fell he came in contact with other wires; that his fingers and thumb had to be amputated. A demurrer was interposed to the complaint and overruled. Appellant answered, denying the material allegations of the complaint, except formal matters, and those covered by the following admissions:

"That respondent was at least fifteen years old at time of accident; that appellant is a corporation, and engaged in manufacturing electricity, and furnishing and selling same; that its power house is on the south bank of the Spokane river, immediately east of the piers of the Monroe street bridge; that the top of said bridge is used as a public thoroughfare; that the roadway or top of said bridge is at a great height from the ground and water underneath same; that said bridge is held in position by a series of steel supports of great height; that the said supports, in some places, are held together by steel plates or slats of steel, which slats or plates are run from one support to another on an angle; that on and prior to March 10, 1905, poles and wires were maintained at the place complained of, and that some of the wires were constantly charged with electricity."

The defense of contributory negligence was pleaded, and it was alleged that appellant had used the best means of insulation known to science.

There is but little controversy between the parties as to the character of the bridge, and the location and use of the electric wires. It appeared from the evidence that pigeons were in the habit of nesting about the bridge, and that boys sometimes climbed the piers in order to catch the pigeons, or find their nests, and

sometimes as a matter of sport, and in playing such games as "follow the leader." It appears that near the foot of the piers on the other side of the river there were good playgrounds, but such was not the case on the side where respondent was injured, although boys were frequently about there. It was in evidence that boys were seen playing about the bridge at different times during the period of two or three years immediately prior to this accident. It does not appear that they were in the habit of climbing the pier near which the wires were, and from which respondent fell. The evidence does not show that appellant had actual knowledge of boys climbing these piers, nor that there was such an amount of climbing near the wires as would impute knowledge to it thereof. Respondent's witness McCormick, bridge foreman and inspector for the city, testified that the bridge was 138 feet above the water in the river; that the lattice work was sharp and hard on the feet and hands, and did not make a good ladder; that he had sometimes seen boys around the bridge, usually at the other end, and had driven them away; that he had never seen boys on any of the piers higher than twenty-three or twenty-four feet. This evidence did not seem to be disputed in any material part. Another of respondent's witnesses, one Rogers, a policeman of the city of Spokane, testified that his duties required him to be near this bridge; that he had seen boys playing about the bridge off and on for two or three years; that he had orders to chase them away, and did so. He had never seen them climb the piers, but had seen them on top of the bridge at each end; that he had orders to keep the boys away from there. One Gannon, a witness for the respondent, had seen boys climbing all over the bridge, but usually at places other than where this accident occurred. He worked for the city, and was in the habit of chasing the boys away. Respondent testified that he was playing "hookey" from school; that he saw some pigeons flying about the bridge, and climbed one of the piers; that he felt something touch the back of his coat, and reaching around and without seeing the wires, involuntarily took hold of one, and was thrown to the ground by the shock, his hand being badly burned; that he could have seen the wire had he looked. He stated that he had never previous to that time been under or climbed about the bridge. It appears from the evidence that the electric wires do not run ex-

actly straight or parallel with the bridge, but are nearer to this particular pier than to any other. Respondent was thirty or more feet from the ground when he fell. The plates or strips of steel were twelve to fifteen inches long, two or three inches wide, one-fourth of an inch thick, with sharp corners or edges, and fastened upon the steel piers so as to form sharp angles, rather than being attached at right angles as is the case with the rungs of an ordinary ladder. The wire nearest to the pier was fifteen and one-half inches distant therefrom, and was on the lowest arm of the electric pole, and was insulated and carried comparatively low voltage. The next wire above was eighteen inches from the pier. From the complaint and evidence we think it unquestionably appears that respondent took hold of a wire some distance above those two wires which was heavily charged with electricity, and some thirty inches from the bridge pier.

It is urged by appellant that the complaint does not state a cause of action, and that the evidence introduced is not sufficient to support any verdict or judgment in favor of respondent. It is contended that the respondent was a trespasser toward whom the appellant owed no duty other than to avoid wilful injury; that its wires were being used for a legitimate purpose, in a place where they had authority to place them, and that there is nothing in the circumstances alleged or proven sufficient to fix liability upon it for the injuries sustained by the respondent. Respondent meets these contentions of appellant by the assertion of several propositions which we will consider seriatim. He urges first:

the purpose of furnishing the public a means of crossing a goodly sized river. It was intended that the public should walk or ride upon the roadway at the top of said bridge. The lattice work upon the sides of these piers was not intended to constitute ladders or furnish means of access to or from the top of the bridge. The public was not invited nor expected to use such lattice work for such a purpose. No one, other than an employee or agent of the city intrusted with some duty in connection with the inspection, supervision, care, or repairing of said bridge, would have any authority to climb up or down said lattice work. This being true, it follows that respondent as one of the general public had no authority justifying his presence at the place where he was injured. It is not pretended that he was an employee or agent of the city, or that he had any authority therefrom to be there. He was not even a licensee, but was a mere trespasser. It will, therefore, be seen that the proposition of law urged by respondent, as above set forth, cannot avail him under the circumstances of this case.

2. Respondent urges "that it may always be assumed that every person has performed his duty under the law, and hence that the placing of wires or other electrical apparatus in close proximity to places or structures where persons rightfully go for business or pleasure constitutes an implied assurance of safety, and an invitation to take hold of, or come in contact with, such wires, if such persons may for any reason choose to do so." This proposition of law, even if sound (which in its entirety we do not believe) would not apply to the facts of this case, for the reason, as already stated, that respondent did not "rightfully go for business or pleasure" up or down this pier. People who have occasion to use wires highly charged with electricity must be held to a high degree of care, and when they place those wires in close proximity to places or structures where other persons may rightfully go for business or pleasure, it is incumbent upon them to use a high degree of care to prevent any person from being injured by coming in contact therewith. But we cannot go to the extent of saying that the presence of such wires in such a place constitutes an invitation to take hold of, or come in contact with, them. When a person, rightfully or wrongfully in such a place, sees a wire which he knows may be highly dangerous, it is his duty to avoid

coming in contact therewith, rather than to accept its presence as an invitation to make such contact.

3. Respondent urges that this bridge and the piers thereof and immediate surroundings and the presence of the pigeons rendered the situation an attractive one for boys, and that the appellant was under obligations to keep its dangerous wires out of the reach of said boys, or to keep them so completely insulated that they would be harmless in case a boy should take hold of, or come in contact with, them. While attorneys for respondent assert in their brief that they do not rely upon the "turntable doctrine," it would seem that they invoke principles that are nearly akin thereto. It will be noticed that it is not alleged, proven, or urged that respondent was allured to the place of his injury by reason of any attraction connected with any structure, device, or property of appellant. The things that constituted the attraction which it is claimed drew him to this place were features connected with the river, the bridge, and the pigeons, and were matters for the existence of which appellant was not responsible. It is urged by respondent that, while he may have been a trespasser as to the owner of the bridge, the city, he was not a trespasser as against the appellant. If, under given circumstances, a person, in maintaining a dangerous agency upon his own premises, would not be liable for injuries therefrom to a trespasser upon said premises and would not be holden to anticipate the presence of such trespasser, we do not see why he should be holden to foresee the presence of a trespasser upon adjoining property, or why he should be under obligation to guard against the possible presence of one trespassing upon the adjoining premises so near as to be injured by said dangerous agency. Ordinarily a person whose duty it is to furnish protection to others against a dangerous agency, fully complies with the law when he provides such a protection as will safely guard against any contingency that is reasonably to be anticipated. He is not legally bound to safeguard against occurrences that cannot be reasonably expected or contemplated as likely to occur. *Decker v. Stimson Mill Co.*, 31 Wash. 522, 72 Pac. 98; *Johnston v. Great Northern Ry. Co.* (Wash.), 84 Pac. 627; *Daffron v. Majestic Laundry* (Wash.), 82 Pac. 1090. If the appellant had constructive notice that boys were playing about, and sometimes climbing upon the bridge, the fact of the city's

officers being there to chase them away would likewise be known. The carrying of dangerous electric wires upon high poles or the burying of them in trenches readily occurs to one as an appropriate requisite for the safety of people who may have occasion to come into the vicinity of said wires. But if a boy, through curiosity, should dig up a wire buried in the ground, or should climb to the top of a high pole, and in either case take hold of a "live" wire and be injured, would it be seriously contended that this was a circumstance which the owner of the wire should be held to have anticipated and guarded against? To be sure, it would be a possible contingency; but would it be so probable that any reasonably prudent person would feel it necessary to be guarded against?

The respondent invokes the rule that one must so use his own machinery as not to injure another. This is a wholesome and salutory principle of law; but it must have some limitations. It does not mean that a man must operate his machinery, appliances, or other agencies in such a manner as to absolutely insure and guarantee the safety of every other person. Such owner, in the operation of such agencies, is held to use that degree of care, foresight, and discretion which a person of ordinary care and prudence would use under the same circumstances. As a matter of law, it may be said that a person of ordinary care and prudence, in the operation of an agency so dangerous as electricity, would and should be exceedingly careful and so arrange the means of handling and transmitting this powerful and mysterious element as to protect from harm any person or persons whom he might reasonably expect to be in a position to receive harm therefrom. But to say that the owner or operator of an electric plant should foresee and anticipate the presence of children or others in places where the ordinarily prudent, careful, and foreseeing person would not expect, or deem it likely for, them to be, would impose a burden and responsibility for which there is no justification in law. We do not think it can be said that this appellant should have anticipated that boys would climb up this almost perpendicular pier and from it reach over and take hold of the electric wires strung upon its poles thirty or more feet above the ground, or that the city's watchmen and other servants there stationed would permit such an occurrence. If the company's responsibility extended

this far, it would be difficult to say where a limit could be fixed. In this State we see electric wires stretched on poles through our towns and cities, and along highways, through farms, orchards, and forests in the country. Can it be held that companies operating these wires must keep them out of reaching distance of every high tree, building, fence, wall, pole, or other place of elevation into or upon which a boy may possibly be allured by birds' nests or other attractions? Suppose birds should build their nests under the eaves of a sawmill that had a ladder attached to its side, and a boy, attracted by said ladder and birds' nests, should climb the ladder and purposely or inadvertently thrust his hand through a window against a running saw, in the upper story of said mill, would the owner of the mill be liable for the boy's injury? Suppose a merchant should keep dynamite, in order to have it out of the way of people, upon the roof of his store, and some boy, without the consent and against the wishes of the owner of adjoining premises, should climb a tree thereon for birds and, while up in the tree, reach over and explode some dynamite, would the owner thereof be holden for the injury thereby occasioned to the boy? Regardless of what the name may be, it seems to us that the contention of respondent is an invocation for an extension of the "turntable doctrine" beyond the limits permitted by the law as heretofore announced by this and the great majority of the courts.

In the case of *Clark v. Northern Pacific Ry. Co.*, 29 Wash. 139, 69 Pac. 636, 59 L. R. A. 508, this court said:

"Appellant also cites what are known as the 'turntable cases.' These cases are based upon the theory that a turntable is a machine of such a nature as to attract children to play with it, and, being inherently dangerous for children to handle, negligence is predicated upon the failure to lock it, or securely fasten it so that it cannot be moved by children. The same principle has been applied where other structures or conditions existed, but the doctrine has not been uniformly adopted by American courts, and it has, indeed, been severely criticised. In Beach on Contributory Negligence (3d ed.), § 51*a*, the author observes that the trend of the more recent decisions is against it, and many cases are cited. This court applied the rule in a turntable case in *Ilwaco Ry. & Nav. Co. v. Hedrick*, 1 Wash. 446, 25 Pac. 335, 22 Am. St. Rep. 169; but, in view of the more modern tendency of the courts, we should, however, hesitate to extend the rule as one of general application to other conditions. For especially forcible reasoning upon this subject we refer to *Delaware, L. & W. R. R. Co. v. Reich*, 61 N. J. Law, 635, 40 Atl. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727. The respondent in the case at bar had not placed upon its premises a dangerous machine or device, that was in its nature and at once particularly attractive to children. The deceased boy

neither meddled with nor was he injured by any such instrument. The attractive thing which it is claimed respondent permitted upon its premises was the show."

A case involving similar consideration was that of *Curtis v. Tenino Stone Quarries,* 37 Wash. 355, 79 Pac. 955, where the court spoke as follows:

"To hold, as a general and universal rule of law, that the owners of mills and factories must so construct and maintain their premises as to be reasonably safe for trespassers, infants, or adults, regardless of how they may gain admission, would be destructive of all industry and all property rights."

Discussing the doctrine now invoked by respondent, this court, in the case of *Harris v. Cowles,* 38 Wash. 336, 80 Pac. 537, 107 Am. St. Rep. 847, employed this language:

"Whatever may be said of the wisdom of that rule, as applied to the one condition, established as it was by judicial decisions, but severely criticised by others refusing to follow it, still, when we contemplate its extension to the manifold other relations and conditions which arise in the affairs of life, we must see that it would be productive of litigation to such an extent as would greatly endanger the security of property interests. It is aptly suggested by respondent, in his brief, that swings, teeter boards, lumber piles, fences, gates, walls, buildings, trees, hanging on vehicles, and numerous other similar things are attractive to children. It will, therefore, be seen that, if this doctrine should be made one of general application for the protection of children against everything that may be especially attractive to them, it would result in requiring all property holders to assume toward children who may be attracted to their premises a degree of duty and care which properly belongs to parents or guardians."

The unfortunate accident which befell respondent was an unusual and extraordinary one which we do not believe appellant could reasonably have anticipated. Under the pleadings and all of the evidence construed as favorably as possible in behalf of the respondent, we think liability on the part of appellant for this boy's injury is not established.

The judgment of the honorable Superior Court is reversed, and the cause remanded with instructions to dismiss the action.

MOUNT, C. J., and RUDKIN, FULLERTON, HADLEY, CROW, and DUNBAR, JJ., concur.

BUTLER v. FRONTIER TELEPHONE COMPANY.

New York Court of Appeals — Dec. 21, 1906.

186 N. Y. 486, 79 N. E. 716.

EJECTMENT — OCCUPATION BY TELEPHONE WIRE OF SPACE ABOVE LAND. — **An action of ejectment will lie where the soil is not touched, but part of the space a few feet above the soil is occupied by a telephone wire unlawfully strung by the defendant above the plaintiff's premises; the disseizin of the owner is measured by the extent of the space occupied and the sheriff can physically remove the wire and thereby restore the plaintiff to possession.**

Appeal from a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department affirming a judgment in favor of plaintiff entered upon a decision of the court at a Trial Term without a jury. *Affirmed.*

This is an action of ejectment, which was tried by consent before the court without a jury. The trial judge found as facts that "the defendant on or about January 1, 1903, without the consent of the plaintiff and without lawful authority, entered upon" his premises in the city of Buffalo "and stretched a wire over and across the same in the manner described in the complaint and maintained said wire upon said premises until January 10, 1903, when the defendant removed the said wire entirely from plaintiff's said premises."

According to the allegations of the complaint the wire was strung "about thirty feet from the surface of the ground on the easterly side and slanting to about twenty feet on the westerly side," reached "across the entire width of said premises."

The trial judge further found that "the plaintiff has been in possession of the premises described in the complaint at all times mentioned therein and since, except that portion thereof occupied by the defendant with said wire during the period specified." The damages sustained by the plaintiff were assessed at six cents for "the withholding by the defendant of that portion of the premises occupied by said wire for the period above specified." There was neither allegation nor evidence that the wire was supported by any structure standing upon the plaintiff's lot. The action was commenced on the 5th of January, 1903.

The court found as a conclusion of law that the plaintiff, as the owner in fee of the premises in question, "was entitled at the commencement of this action to have said wire removed from said premises, and is entitled to judgment against the defendant so declaring, and for six cents damages for withholding said property and for the costs of this action * * *."

The judgment entered accordingly was affirmed on appeal to the Appellate Division by a divided vote, and the defendant now comes here.

Ejectment. — An action for ejectment may be brought by a grantee to compel a telegraph company to remove wires strung over private lands. *Postal Telegraph Cable Co. v. Eaton*, 170 Ill. 513, 49 N. E. 365.

Lyman M. Bass, for appellant.

George C. Hillman, for respondent.

Opinion by VANN, J.:

The question presented by this appeal is whether ejectment will lie when the soil is not touched, but part of the space a few feet above the soil is occupied by a telephone wire unlawfully strung by the defendant across the plaintiff's premises? This question has never been passed upon by the Court of Appeals nor by the Supreme Court, except in the decision now before us for review. Questions similar, but not identical, as they related to overhanging eaves, projecting cornices or leaning walls, were decided in favor of the defendant in *Aiken v. Benedict,* 39 Barb. 400, and *Vrooman v. Jackson,* 6 Hun, 326, and in favor of the plaintiff in *Sherry v. Freeking,* 4 Duer, 452. In *Leprell v. Kleinschmidt,* 112 N. Y. 364, the question as to the effect of projecting eaves was alluded to but not decided, because there was in that case "a physical entry by the defendant upon the land of the plaintiffs and an unlawful detention of its possession from them."

The precise question before us does not appear to have been passed upon in any other State, and upon the cognate question relating to projecting cornices and the like, the authorities are divided. Some hold that ejectment will lie because there is an actual ouster or disseisin. *Murphy v. Bolger,* 60 Vt. 723; *McCourt v. Eckstein,* 22 Wis. 153; *Stedman v. Smith,* 92 Eng. C. L. 1. Others hold that there is not such a disturbance of possession as to sustain an action in that form. *Norwalk H. & L. Co. v. Vernon,* 75 Conn. 662; *Rosch v. North,* 99 Wis. 285. The case last cited does not overrule the earlier case in Wisconsin, but proceeds upon the theory that the aerial space was occupied by the projecting eaves of both parties, one above the other, on opposite sides of the boundary line. Some of the cases hold that a court of equity may order the removal of a projection without deciding whether ejectment will lie or not. Thus, in *Wilmarth v. Woodcock,* 58 Mich. 482, 485, it was decided that equity would require the removal of a projecting cornice because "no remedy at law is adequate, owing to the uncertainty of the measure of damages, to afford complete compensation." But, as the learned court continued: "No person can be permitted to reach out and

appropriate the property of another and secure to himself the adverse enjoyment and use thereof, which, in a few years, will ripen into an absolute ownership by *adverse possession.*" See also *Plummer v. Gloversville Electric Co.,* 20 App. Div. 527.

While some of the cases may be harmonized by resort to the distinction between " disseisins in spite of the owner, and disseisins at his election," the main question is open, and must be determined upon principle.

The defendant concedes that the plaintiff has a remedy, but insists that it is an action for trespass, or to abate a nuisance, while the plaintiff claims that ejectment is a proper remedy and one of especial value as it entitles him, if he needs it, to a second trial as a matter of right and to costs, even if he recovers less than $50 damages. Code Civ. Proc., §§ 1525, 3228.

An action of ejectment, according to the code, is " an action to recover the immediate possession of real property." Code Civ. Proc., § 3343, sub. 20. While the statute to some extent regulates the procedure, it did not create the action and for the principles which govern it resort must be had to the common law. Code Civ. Proc., §§ 1496 to 1532; Real Property Law §§ 1, 218; 2 R. S. 303.

Without entering into the somewhat involved and perplexing learning upon the subject, it is sufficient to say that, as all the authorities agree, the plaintiff must show that he was formerly in possession, that he was ousted or deprived of possession and that he has a right to re-enter and take possession. It is ad-

Newell on Ejectment, 38; Warvelle on Ejectment, 22. Mines, quarries, mineral oil and an upper room in a house are familiar examples. Is the unauthorized stringing of a wire by one person over the land of another an ouster from possession to the extent that the wire occupies space above the surface as claimed by the plaintiff, or a mere trespass or interference with a right incidental to enjoyment as claimed by the defendant? Was the plaintiff in the undisturbed possession of his land when a portion of the space above it was occupied by the permanent structure of the defendant, however small? Was the space occupied by the wire part of the land in the eye of the law?

What is "real property?" What does the term include so far as the action of ejectment is concerned? The answer to these questions is found in the ancient principle of law: *Cujus est solum, ejus est usque ad coelum et ad inferos.* The surface of the ground is a guide, but not the full measure, for within reasonable limitations land includes not only the surface, but also the space above and the part beneath. (Co. Litt. 4a; 2 Blackstone's Comm. 18; 3 Kent's Com. [14th ed.] *401.) "*Usque ad coelum*" is the upper boundary, and while this may not be taken too literally, there is no limitation within the bounds of any structure yet erected by man. So for as the case before us is concerned, the plaintiff as the owner of the soil owned upward to an indefinite extent. He owned the space occupied by the wire and had the right to the exclusive possession of that space which was not personal property, but a part of his land. According to fundamental principles and within the limitation mentioned space above land is real estate the same as the land itself. The law regards the empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly.

If the wire had touched the surface of the land in permanent and exclusive occupation, it is conceded that the plaintiff would have been dispossessed *pro tanto.* A part of his premises would not have been in his possession, but in the possession of another. The extent of the disseisin, however, does not control, for an owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as much as a mine beneath. If the wire had been a huge cable, several inches thick and but a foot above the ground, there would have

been a difference in degree, but not in principle. Expand the wire into a beam supported by posts standing upon abutting lots without touching the surface of plaintiff's land, and the difference would still be one of degree only. Enlarge the beam into a bridge, and yet space only would be occupied. Erect a house upon the bridge, and the air above the surface of the land would alone be disturbed. Where along the line of these illustrations would dispossession begin? What rule has the law to measure it by? How much of the space above the plaintiff's land must be subjected to the dominion of the defendant in order to effect a dispossession? To what extent may the owner be dispossessed and kept out of his own before there is a privation of seisin? Unless the principle of *usque ad coelum* is abandoned any physical, exclusive and permanent occupation of space above land is an occupation of the land itself and a disseisin of the owner to that extent.

The authorities, both ancient and modern, with some exceptions, not now important, agree that the ability of the sheriff to deliver possession is a test of the right to maintain an action of ejectment. *Jackson v. Buel,* 9 Johns. 298; *Woodhull v. Rosenthal,* 61 N. Y. 382, 389; *Patch v. Keeler,* 27 Vt. 252, 255; *Warvelle* on Ejectment, 34; Crabb on Real Property, 710; Butler's *Nisi Prius,* 99. "The rule now is, that when the property is tangible and an entry can be made and possession be delivered to the sheriff, this action will lie." *Nichols v. Lewis,* 15 Conn. 137. The defendant insists that the sheriff cannot give possession of space any more than he can deliver water in a running stream or "air whirled by the north wind." When the space over land is unoccupied there is no occasion for delivery, because there is nothing to exclude the owner from possession. The sheriff, however, can deliver occupied space by removing the occupying structure. All that he does to deliver possession of the surface of land, or of a mine under the surface, is to remove either persons or things which keep the owner out. He does not carry the plaintiff upon the land and thus put him in possession, but he simply removes obstructions which theretofore had prevented him from entering. So, in this case, that officer can deliver possession by removing the wire, the same as he would if one end happened to be embedded in the soil, when no question as to the right to

bring ejectment could arise. Where there is a visible and tangible structure by which possession is withheld to the extent of the space occupied thereby ejectment will lie, because there is a disseisin measured by the size of the obstruction, and the sheriff can physically remove the structure and thereby restore the owner to possession.

The smallness of the wire in question does not affect the controlling principle, for it was large enough to prevent the plaintiff from building to a reasonable height upon his lot. The prompt removal of the wire after the suit was brought could not defeat the action because the rights of the parties to an action at law are governed by the facts as they existed when it was commenced. *Wisner v. Ocumpaugh,* 71 N. Y. 113.

The judgment should be affirmed, with costs.

CULLEN, Ch. J., EDWARD T. BARTLETT, WILLARD BARTLETT and CHASE, JJ., concur; O'BRIEN and HAIGHT, JJ., absent.

Judgment affirmed.

TROUTON v. NEW OMAHA THOMSON-HOUSTON ELECTRIC LIGHT CO.

Nebraska Supreme Court — Dec. 21, 1906.

77 Neb. 821, 110 N. W. 569.

NEGLIGENCE IN MAINTAINING ELECTRIC WIRES — SUFFICIENCY OF PETITION. — Petition examined, and *held* obnoxious to a general demurrer under the former decision of this court in *New Omaha Thomson-Houston Electric Light Company v. Anderson, ante,* p. 306, which is herein followed and approved.

(Syllabus by the Court.)

Appeal by plaintiff from judgment for defendant. *Affirmed.*

F. T. Ramson and *Gurley & Woodrough,* for appellant.

W. W. Morsman, for appellee.

Opinion by OLDHAM, C.:

This is an action by the administrator of the estate of James Adams, deceased, for the benefit of the next of kin, in which the plaintiff seeks a recovery against the defendant, because of its alleged negligent acts in connection with the management of its

electric wires, by means of which a bolt of electricity is charged to have passed down a ladder, which was being removed from between the wires by the deceased and three other members of the fire department of the city of Omaha, and which occasioned the death of each of the firemen so engaged. Two cases involving this same injury have been before this court, and every question then at issue was examined and finally determined in the opinion delivered in *New Omaha Thomson-Houston Electric Light Company v. Anderson*, 9 Am. Electl. Cas. 306, 102 N. W. 89. As every question then involved in the controversy is set forth and discussed in that opinion, we need only consider such new allegations in the present petition as seek to charge acts of negligence not considered in that opinion. During the pendency of the appellate proceedings in the two cases before mentioned, the case now at bar remained undisposed of on the docket of the District Court of Douglas county, and, after the opinions in the other two cases were delivered by this court, plaintiff filed an amended petition, to which a demurrer was interposed. This demurrer was sustained by the trial court. Plaintiff then asked leave to file a second amended petition, which was not verified, and, this leave being denied, the court dismissed the amended petition. To reverse this judgment of dismissal plaintiff has appealed to this court.

As there was no showing of any abuse of discretion in the refusal of the trial court to permit the filing of the second amended petition, and as on such refusal plaintiff appears to have elected

petition, the chief of the fire department and the city electrician had sole charge of the matter of cutting and removing the wires of the defendant company during the time of the fire, and that the lineman, who was furnished by the company to attend at places of fire, acted, while performing such duty, under the sole charge of the fire chief and the city electrician, and not as the agent of the defendant. In the amended petition in the case at bar, plaintiff, after alleging the death of his intestate from a bolt of electricity hurled down the fire ladder while it was being removed from between the wires of the defendant company, set up, in substance, the ordinance of the city of Omaha, which was reviewed in our former opinion, and alleged that the defendant company sent a lineman to the fire in conformity with the provisions of this ordinance, and that it was the duty of the chief of the fire department and the city electrician to cut the wires, when it was necessary for the safety of those engaged in extinguishing the fire, and alleged that they (the officers and lineman) neglected to perform this duty. If the petition had gone no further, it would plainly have failed to state a cause of action against the defendant under our former opinion, but it proceeds to charge that the defendant, for the purpose of protecting its property and restoring and repairing the wires that might be cut at the time of the fire, sent another employee, named Brinkman, to repair and restore wires and prevent its property from being unnecessarily destroyed, and "to speak and act for the defendant," and that this latter employee was present when the fireman attempted to lower the ladder, and that he knew of the danger to the fireman by reason of currents of electricity, which were or might be conducted by said wires, and that said wires might momentarily become charged with currents of electricity, and that, with such knowledge, Brinkman negligently and carelessly neglected to warn the fireman of the danger, but, on the contrary, carelessly, wantonly, and negligently invited the firemen to proceed to lower the ladder by calling out to them: "All right, boys. Go ahead. Those wires are dead."

It is determined, in the decision already rendered, with reference to this accident, that defendant light company owed no duty to the firemen to warn them of danger either in ascending or descending the ladder or in removing it from between the wires after

the fire was extinguished. This was a duty, if such duty existed, which, under the ordinance pleaded in the amended petition and under our former opinion, devolved upon the officers of the city. While the amended petition charges that Brinkman knew, or might have known, that the wires were, or might be, charged with dangerous currents of electricity, yet the petition simply shows a remark made by Brinkman, which amounted to an expression of his opinion that the wires were dead. Now, according to the allegations of the amended petition, Brinkman was not sent to co-operate with the officers of the fire company, but only to care for the property of the defendant, which might be injured at the fire, and there is nothing in the scope of the agency pleaded which would bind the company for an opinion he might express in the presence of the firemen as to whether the wires were dead or alive. We are therefore of opinion that the judgment of the trial court in sustaining defendant's demurrer and dismissing plaintiff's petition was right, and we recommend that it be affirmed.

AMES and EPPERSON, CC., concur.

PER CURIAM:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

OTHER 1906 CASES NOT REPORTED IN FULL.

1. Eminent Domain, When Furnishing Electricity Is Public Use. (1-3.)

2. Power of City to Grant Exclusive Franchise to Electric Com-

a public use. It is alleged that the purpose of the plaintiff corporation is to generate, transmit, and furnish electricity and electric current to the public in general, and to all inhabitants and persons within the county of Shasta and elsewhere, in the State of California, for the necessary public use of light, power, and heat, that, to enable plaintiff to perform its functions in this respect, it is necessary to conduct water from Bear creek a long distance, by means of ditches, flumes, and pipe lines, to its power house, for use in operating machinery for generating and transmitting electricity and electric current designed for supplying mines, quarries, railroads, tramways, mills, and factories in said county of Shasta and elsewhere in the State, not owned by plaintiff, also for supplying light, heat, and power to villages, towns, and incorporated cities in the county of Shasta and elsewhere, in California, and to the inhabitants thereof," etc. "Taking the allegations of the complaint as a whole into consideration, and being mindful that the plaintiff has acquired franchises from the city of Redding and from the county of Shasta for the purpose of serving the inhabitants of both such municipalities with light, heat, and power, I am of the opinion that the plaintiff is shown to be a public service corporation, and hence that the complaint is within itself sufficient."

2. Eminent Domain — Public Use. — In the case of *State ex rel. Harris et al. v. Superior Court of Thurston County*, 48 Wash. 141, 85 Pac. 666, it was held that a light and power company, employed under certain charter provisions to furnish light to designated cities and to run electric cars, could not condemn land for the purpose of securing power so as to sell electricity to manufactories and for different purposes. Such taking of land was not for a public use. "Manufacturing, generating, selling, distributing, and supplying electricity for power for manufacturing or mechanical purposes is not a public use for which private property may be taken against the will of the owner."

3. Eminent Domain — When Immediate Possession of Condemned Lands Ordered under Code Civ. Pro., § 3380 — Public Purpose. — *In re Niagara, Lockport & Ontario Power Co.*, 111 App. Div. 686, 97 N. Y. Supp. 686, an appeal was taken from an order of the Supreme Court permitting the plaintiff to enter immediately upon certain condemned property. The order was affirmed, and the court held that when the plant of an electric power company is partly constructed and the company is under contract to receive large quantities of electric power from other companies which are ready to deliver, and is also under contract to deliver certain power, and when the transmission of the power in other ways than those contemplated would be dangerous and impracticable, "the public interests will be prejudiced by delay," within the meaning of section 3380 of the Code of Civil Procedure, providing that immediate possession of condemned lands will be awarded if public interests will be prejudiced by delay, upon the petitioner paying the proper value of the lands into court.

It was also held that the extent of the business contemplated, including as it does the furnishing of electricity for the use of the inhabitants in a thickly settled and extensive territory for illuminating purposes and for the use of extensive street surface railroads, constitutes a public use within the definition of that comprehensive term.

4. Municipal Corporations — Power to Grant Exclusive Franchise to Electric Light and Power Company. — In the case of *Water, Light &*

Gas Co. v. City of Hutchinson et al., 144 Fed. 256, a suit was brought to restrain the city of Hutchinson from entering into a contract for electric light and power with another company, the plaintiff contending that it had the exclusive privilege for a period of twenty years. The court said: "But it is quite clear from a consideration of the fundamental principles of government and an examination of the adjudicated cases, defendant city under our constitution possessed neither the inherent power to make the exclusive contract claimed by complainant, nor did the Legislature of the State confer or attempt to confer upon it, such plenary power, under the statutory provisions quoted, from the organic law of the city. Before the contention of complainant in this suit to the exclusive right claimed may be upheld, it must appear that the Legislature of the State, in express terms, or by necessary and inevitable implication, delegated to the defendant city such sovereign and plenary power as once exercised by it exhausted the power to further contract in that regard during the life of the grant. This, as has been seen, it did not do." Demurrer to bill for injunction sustained and held that the city having no power to grant the exclusive right claimed by complainant, such right if granted in terms would be void as to its exclusive feature.

5. Municipal Corporations — Issuance of Bonds by City for Purpose of Erecting Lighting Plant. — In the case of *Baker v. City of Cartersville*, 127 Ga. 221, 56 S. E. 249, it was held that where, in pursuance of a notice published as required by law, an election has been duly held to determine whether a city shall issue and sell bonds of a given amount for the purpose of erecting an electric light plant for the use of the city, and bonds of another designated amount for the purpose of improving and enlarging the capacity of its gas works, and such election has resulted in the favor of the issue of such bonds, and they have been duly validated, and subsequently the Legislature confers upon such city power and authority to establish, own and operate an electric light plant and gas works, for the purpose of supplying the city and its inhabitants with lights, such city may lawfully use electric light plant, purchased and installed with the proceeds of the sale of the first mentioned bonds, and its gas works when improved and enlarged with the sale of the other bonds, not only for the purpose of lighting its streets and public places, but also for the purpose of supplying its inhabitants with light

transformer, when in proper working order, reduced the voltage to 104 volts to be carried on the secondary wires leading to the wagon shop; that a voltage of 2,100 volts was dangerous when communicated to a person through the wires and apparatus installed in the buildings and shops, but a voltage of 104 volts could be thereby used with safety. It is further established by the evidence that at about 5 P. M. on May 18, 1903, appellee's intestate, Leonard Schmitt, employed as a foreman of the Knapheide Wagon Company, went into the cellar of the wagon shop and while there attempting to turn on the electricity in an incandescent lamp received the shock resulting in his death. That said incandescent lamp in the cellar was suspended from the ceiling above by a wire cord, to which was attached at the lamp a brass socket without lining of nonconducting material, and that around such brass socket and the lamp attached to it was an elliptically shaped wire guard about four inches in diameter not protected by insulation; that in attempting to turn on the light deceased necessarily stood on the damp earth floor of the cellar; that at the time of the accident the transformer was so defective that it failed to reduce the voltage on the primary wire of appellant's, and the entire current of 2,100 volts carried by said primary wires passed into the secondary wires connected with the wires in the buildings of the Knapheide Wagon Company."

"The case meets every requirement for the application of the doctrine, *res ipsa loquitur*. *I. C. R. R. Co. v. Swift*, 213 Ill. 307. If the system of wiring in the factory buildings had been defective or inefficient, appellant could not thereby escape liability, if its negligence * * * had been established as a proximate cause of the death of the appellee's intestate."

It was also held that the negligence of the Quincy Gas and Electric Company would not be excused by reason of the intervention of the act of God, that is, lightning. If such negligence alone was either the proximate cause of the injury or concurring with such act of God was the proximate cause.

The case was reversed for errors committed at the trial and remanded.

7. Injury to Passenger in Rush Caused by Explosion of Controller on Car Passing upon Adjoining Track. — In the case of *German v. Brooklyn Heights Ry. Co.*, 107 App. Div. 354, 95 N. Y. Supp. 112, it appeared that the plaintiff was a passenger upon one of defendant's open cars; that as such car reached, or nearly reached, another of defendant's cars traveling upon an adjoining track, the controller on such car suddenly exploded, causing flames and smoke, which enveloped the motorman of that car, and shot toward the car upon which plaintiff was a passenger; that the passengers on plaintiff's car made a rush to leave the car, and in such rush the plaintiff, who had stood up for the purpose of seeing the cause of the excitement, was pushed off the car, falling upon the street, and a number of persons fell upon her, causing injury. It was clearly established by the evidence that the explosion occurred in the controller box of the other car, which was a portion of defendant's own equipment, over which it had exclusive control; that it was an unusual occurrence, indicating an extraordinary condition, and presence of causes not usual in the ordinary operation of the car. There was also evidence to justify the jury in finding that there was negligence on the part of defendant's employees in inspecting the controller on the car in question, which resulted in the accumulation of dirt and dust in the controller box, causing or contributing to the explosion, and that its primary cause was the negligence of the motorman in the operation of the car. It

was held that the questions whether the defendant was guilty of negligence and whether the plaintiff was free from contributory negligence, were for the jury, and that a judgment entered upon a verdict in favor of the plaintiff should be affirmed. The court said: "It brought the case within the rule that where the thing which causes the accident is exclusively controlled or managed by the defendant, and the accident is such as in the ordinary course of things does not happen if those who have such control and management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. This was all that was necessary to warrant the submission of the case to the jury."

8. Injury to Passenger by Being Thrown from Her Seat by Sudden Stopping of Car — Explosion on Car. — In the case of *Dowling v. Brooklyn Heights R. Co.*, 107 App. Div. 312, 95 N. Y. Supp. 105, the plaintiff, who was a passenger on one of defendant's open cars, claimed to have been injured by the action of the motorman in checking the motion of the car so quickly as to throw her from her seat into the street. Just before the car was thus suddenly stopped, an explosive report was heard by the passengers, and the car was filled with fire and smoke. This caused the motorman to shut off the power and put on the brakes. The plaintiff sought to prove that the explosion was due to a short circuit produced by the rapid movement of the car through water on the street, which, in consequence of a recent rainfall, was high enough to splash up on the sides. The defendant sought to show that the car was in fact struck by lightning. After a verdict for the plaintiff the trial court granted a motion to set it aside, and directed a verdict for the defendant, on the ground that the story of the plaintiff was palpably false, and because the unmistakable weight of the evidence was that the car was struck by lightning. It was held that the trial court went too far in directing a verdict for the defendant, although it was warranted in granting a new trial; that the direction of a verdict for the defendant was evidently based upon the assumption that the alarming explosion which occurred in the car, whatever its cause, justified the motorman in stopping the car promptly, in view of the emergency, and that, at most, he was chargeable only with an error of judgment, upon which negligence could not be predicated. As to this the court said: "The correctness of this latter conclusion could hardly be questioned if it appeared beyond dispute that the defendant was not chargeable with negligence in case the explosion occurred on account of a short circuit, produced by running the car at an imprudent rate of speed in view of the quantity of water on the tracks. If the motorman was careless in this respect, and his carelessness thus occasioned the emergency which required him to bring the car to a sudden stop, the defendant would be liable for his negligence, taking his whole conduct into consideration, although the sudden stopping of the car might not alone have been anything more than an error of judgment." As to setting aside the verdict, it was held that the appellate court would not interfere with the discretion which must be exercised by the trial courts, saying: "Where the trial judge has set aside the verdict because it seems to him to be based on false testimony, his action should not be reversed unless it very clearly appears that he was wrong in the opinion which he affirmed as to truthfulness of the evidence."

9. Injury to Passenger Jumping from Car in Fright on Seeing Apparent Electrical Disturbance in Car — Admissibility of Evidence that Conductor Jumped Before Passenger — Instructions. — In the case of Blumenthal v. Union Electric Co., 129 Ia. 322, 105 N. W. 588,

the deceased was a passenger on one of defendant's cars which was rapidly descending a steep grade. Flashes of fire, accompanied by smoke and hissing noise, appeared around the forward switch in the car, whereupon deceased and others jumped from the car. The court admitted testimony tending to show that immediately before and at the time the fire appeared, the car was running at a high rate of speed, and that it had a rocking or bouncing motion, and also that the track was uneven. The defendant asked that such evidence be limited to the question of its negligence in causing the fire; the court refused to so limit, and error was predicated on the ruling. It was held that the evidence was admissible, as the plaintiff might have been influenced by the combination of speed and flame, for both of which the defendant might have been liable. Citing *Eginoire v. County*, 112 Ia. 559, 84 N. W. 758. Certain rules of the defendant regulating the speed of its cars down hill and requiring stops at specified points, were admitted over the defendant's objection. "Held, that no possible prejudice could have resulted from their consideration by the jury. They did not require a higher degree of care than imposed by law, and, further, their effect was properly limited by an instruction. *Hart v. Railway Co.*, 109 Ia. 631, 80 N. W. 662." It was also held that evidence that the conductor of the car became frightened and jumped before deceased did was competent to show negligence in operating the car with an incompetent conductor in charge of it; that the failure of a street railway company to employ men of experience and competent to operate cars by electricity was negligence. In this connection the court said: "Electricity is a dangerous agent, and its use must be attended with the highest degree of care and skill. But, notwithstanding this, there may be an appearance of great danger, when in fact there is no danger at all. It may be negligence, therefore, to place in charge of a car a person whose experience and competency are so limited that he does not know whether the danger is real or only apparent. *Scott v. Telephone Co.*, 126 Ia. 524, 102 N. W. 432; *Baldwin v. Railway Co.*, 68 Conn. 567, 37 Atl. 418; *Crisman v. Railway Co.*, 110 La. 640, 34 South. 718, 62 L. R. A. 747. If an experienced and competent conductor would have understood the real condition when the fire appeared, and, exercising the care required by law, would have remained in the car, and so far as possible would have prevented the departure therefrom of the deceased, the evidence complained of was competent on the question of the appellant's negligence in operating the car with that conductor in charge of it."

10. Injury to Person by Coming in Contact with Live Wire Suspended from Roof of Car at Rear of Platform Which Passenger Believed to Be a Rope.—In the case of *Hopkins v. Mich. Traction Co.*, 144 Mich. 359, 107 N. W. 909, plaintiff alleged that he was compelled to stand upon the rear platform because the car was crowded; that the defendant caused to be left suspended a live electric wire, from the roof or ceiling of the car, in a manner and at a place where passengers, standing on the rear platform, would easily come in contact therewith; that such wire appeared and looked very much like a rope which is ordinarily suspended by the defendant on its cars for the purpose of raising and lowering the trolley arm, and that, believing the wire to be a rope, the plaintiff's hand came in contact therewith and, without his fault or negligence, he received a severe shock; that this wire, when attached to a trailer, was used for the purpose of illuminating the trailer.

Defendant demurred on the ground that the declaration did not allege sufficiently how or why plaintiff came in contact with the wire, and that it practically averred that he came in contact with it voluntarily and without necessity and as a trespasser. It was held that the declaration was sufficient to support a judgment based thereon. The court said: "If he had good reasons for taking hold of it, he was not guilty of contributory negligence. If he had no occasion to touch the wire, and did it out of curiosity or voluntarily, without any necessity therefor, he would be guilty of contributory negligence. The liability depends upon the proofs."

11. Passenger Injured as Result of Explosion of Controller — Inference of Negligence. — In the case of *Gilmore v. Milford & U. St. Ry. Co.*, 193 Mass. 44, 78 N. E. 744, it appeared that the plaintiff was injured as the result of an explosion from the controller on a car on which she was a passenger on defendant's lines. The evidence went to show that the flash was more than an ordinary controller flash, that it lasted fifteen to twenty seconds, that it illuminated the whole vestibule and filled the car with dense smoke, that the passengers were all thrown into much confusion. The defendant contended that it was the case of an ordinary flash from the controller which there was no way to prevent, and the occurrence of which would not therefore import negligence on its part. The court refused to direct a verdict for the defendant, from which the defendant appealed. The court said: "The defendant's contention implies that it is not liable for an injury caused by a flash from the controller which could not be prevented by any means that have yet been devised or any care that could be exercised. We doubt the correctness of that proposition. It would seem that if the company sees fit to use a force which is so imperfectly understood that no method has yet been devised for preventing a flash from the controller, the company and not the passenger should bear the risks arising from its use.

"But however that may be, there was testimony tending to show that what occurred was much more than an ordinary flash from the controller. * * There was testimony tending to contradict the statements thus made and to show that what occurred could not have been so serious as thus represented. But it was for the jury to say what the nature of the occurrence was. With slight adaptations the language used by Mr. Justice Hammond in delivering the opinion of the court in *Cassady v. Old Colony Street Railway*, 1 St. Ry. Rep. 330, 184 Mass. 156, 161, 68 N. E. 10, 12, 63 L. R. A. 285, will, we think, apply here: 'The jury upon the evidence may have found that the flame in this case was not the instantaneous and harmless flame which results from a flash from the controller when in proper condition; that the flame was attended with unusual results which would not have occurred if the controller had been in proper condition, and that the most reasonable conclusion was that if proper care had been exercised there would have been no such flame.' The defendant introduced evidence tending to show that it exercised proper care and diligence in inspecting the controller. But the weight to be given to this evidence was clearly for the jury." Judgment affirmed.

12. Injury to Member of Electric Repair Gang Caused in Shoveling Snow from Tracks by Iron Shovel Making Short Circuit between Third Rail and Bolt on Tie — Failure of Company to Give Notice of Danger — Duty to Furnish Safe Appliances. — In the case of *Smith v. Manhattan Ry. Co.*, 112 App. Div. 202, 98 N. Y. Supp. 1, it appeared that plaintiff was a member of an electrical repair gang of defen

ant, and had worked in that capacity nearly six months. When snow fell, which impeded the work of the repair gang, it was the duty of the members thereof to remove the snow. Plaintiff had assisted in such work before, but with a broom, and not with a shovel. He knew that the third rail conveyed a current of electricity, but according to his testimony, he was not familiar with short circuits, and did not know what would produce a short circuit, or that one would be produced by an iron surface coming in contact at the same time with a third rail and a projecting bolt, and he had not been instructed on that point. He testified that he was specifically directed by the foreman to use the shovel with an iron blade and wooden handle, and to do the particular work at which he was engaged when he sustained his injuries. He understood, and the undisputed evidence showed it to be a fact, that there was ordinarily no danger in touching the third rail. The only danger was in touching it with iron, which at the same time touched another iron connected with the ground. It was held that this was not an obvious danger, but one which a layman would not be likely to know unless specially instructed, or unless he happened to observe the fact. According to plaintiff, he was instructed to be careful, but was not warned of this danger, and he had not discovered it by observation. It was held that it was the duty of the defendant to furnish plaintiff with a broom or a wooden shovel, especially in the absence of instructions as to the danger of causing a short circuit, and that the question of plaintiff's contributory negligence and assumption of the risk of defendant's negligence were for the jury, and that a verdict of $1,900 was not excessive where the plaintiff was burned, and one of his eyes injured.

13. Injury to Workman on Elevated Structure by Discharge of Electricity from Feed Wire—Defective Insulation—Inspection—Res Ipsa Loquitur.—In the case of *Carey v. Manhattan Railway Co.*, 50 Misc. 335, 98 N. Y. Supp. 668, it appeared that plaintiff was injured by the discharge of electricity from wires carrying the charge for the operation of an elevated railway by the third rail system when he was engaged at the time in drilling holes under the top girder of the track with the wires in close proximity to his tools, without paying attention to them, or taking any precautions against the danger. It was shown that the wires were sufficiently insulated when put in, a comparatively short time before, and frequently and regularly inspected by a competent person, the last inspection having taken place but a few days before. There was no proof of when or how the abrasion of the insulation occurred. The plaintiff contents himself with showing that the explosion could not have occurred unless there had been some break or defect in the insulation at the point of contact and at the moment of contact, and argued therefrom that this proof, with proof of the explosion, warranted the jury in finding that the defendant had been negligent, either in failing to provide properly insulated wire in the first instance, or in failing to keep it properly insulated after it had been installed.

There was a judgment for plaintiff and defendant appealed. The court said: "This seems to us to be an attempt unwarrantably to extend the doctrine of *res ipsa loquitur*, for it implies the drawing of an inference from the mere happening of the accident that the defect in the insulation, which concededly must have existed at the moment of the explosion, had existed previously for a sufficient time to impute notice to the defendant. The circumstances as disclosed by the evidence warrant no such inference. It was clearly shown that the insulation was originally quite sufficient for the use to which

the wire was to be put; that it had been in place but a comparatively short time, and that it was frequently and regularly inspected by a competent and experienced employee of the defendant, one of such inspections having taken place only a few days before the accident happened. It also appeared that it was quite possible, if indeed not probable, that the insulation might have been abraded by the acts of the plaintiff and his fellows in setting up their tools. In short, there was an entire lack of proof that the insulation was imperfect at any moment before the accident happened; that the wire was improperly insulated when installed, or that the defendant had failed in its duty of frequent inspection. The jury were thus left to conjecture that, owing to some negligence not specified and not disclosed by the evidence, the defendant had failed in its duty toward plaintiff. The most that can be said upon the evidence as presented is that it leaves it unexplained when the insulation became abraded or how the abrasion occurred. This was not sufficient to justify the submission of the cause to the jury."

Judgment for plaintiff reversed.

14. Injury from Electric Wire Caused by Defective Transformer — Evidence — Declarations of Agent. — In the case of *City of Austin et al. v. Nuchols* (Tex.), 94 S. W. 336, an action was brought against the city of Austin and the Austin Water, Light and Power Commission for damages sustained by the appellee. He alleged that as engineer of the Austin Ice and Bottling Works, and while in the discharge of his duties as such, he came in contact with an electric light wire and was severely shocked and burned. It was alleged as one ground of negligence, on the part of the defendants, that they were guilty of negligence in constructing, operating, and maintaining the system of electric light, in that they placed what is known as a Wood's transformer on its line of electric wires which conducted electricity into the plant of the Austin Ice and Bottling Works, and that appellants knew, or could have known by the exercise of ordinary care, that the transformer was defective.

It was held that evidence of statements made by defendants' fireman, who had control of the electric wires and appliances and whose duty it was to inspect the same, to the effect that the transformer in question was of an old style, and would not properly and safely perform the service for which a transformer was intended, was properly admissible, as the declaration of an agent with reference to an act which he was authorized to perform.

When there was no testimony tending to show that, prior to an electrical storm which occurred a few days before the accident, the transformer was defective, evidence that it was old style did not tend to establish the fact that it was defective when originally put in, or that it became defective before the storm.

15. Injury to Boy from Contact with Electric Wire — Evidence. — In the case of *Clements v. Potomac Electric Power Company*, 26 App. (D. C.) 482, an action was brought to recover for injuries to a boy resulting from a shock from an electric wire while with other boys in a vacant lot. It appeared that this lot had been used for many years as a common play ground and that it had been common practice for the boys to climb into the branches of a certain tree thereon. At the time of the accident the plaintiff, together with some of the other boys was on the tree. About four feet from the base of the tree stood a pole with cross bars on which were suspended two wires about eighteen inches apart. These wires ran through an extended branch of

the tree about two and one-half feet from the top. It was held: (1) That where evidence had been introduced tending to show that the wires had been in position for years, and that there was nothing to indicate that they constituted a lighting circuit, it was error not to permit plaintiff to answer a question intended to show that he thought or believed the wires with which he came in contact were old and out of use: (2) It is doubtful if evidence of the general custom of other lighting companies to use uncovered circuits or wires of high voltage would be admissible under any circumstance, but to admit the evidence of such custom in contravention of the express prohibition of the municipal regulations was clearly erroneous. (3) A municipal regulation requiring electric companies to properly insulate their wires imposes a duty upon the defendant for the benefit of the public. (4) Plaintiff was entitled to the protection which would be afforded by compliance with such municipal regulations and had a right to presume that it had been complied with or that the wires were not used to convey a dangerous current.

Judgment in favor of the defendant reversed.

16. Electric Light Wires Across Telegraph Wires — Effect of Storm — Proximate Cause — Presumption of Negligence. — In the case of *Toledo Railway and Light Company v. Rippon*, 28 Ohio Circuit Court 561. it was held that where a company engages in furnishing and transmitting electricity for lighting and power purposes and negligently places its wires in too close proximity to the wires of a telegraph company so that a storm deranging such wires produces a contact, and a workman of the latter company engaged in repairing its wires is killed by the powerful current, such negligence of the light and power company is the proximate cause of the death. It was also held that where a dangerous current of electricity is allowed to escape from the wires of the company supplying it, negligence of such company will not be presumed in an action against it for injuries.

17. Nuisance. — In the case of *Townsend v. Norfolk Railway and Light Company*, 105 Va. 22, 52 S. E. 970, it was held that where the power house of a railway and light company became injurious to adjoining property by reason of the escaping electricity, vibration of the machinery, and smoke, etc., that such acts constituting a nuisance, the company was liable in damages for injuries sustained.

CAHILL v. NEW ENGLAND TELEPHONE & TELEGRAPH CO.

Massachusetts Supreme Judicial Court — Jan. 4, 1907.

79 N. Y. 821.

1. INJURY TO TELEPHONE OPERATOR — ASSUMPTION OF RISK. — Plaintiff, a telephone operator, in an action for injuries resulting from a shock received while in the performance of her duties, may be held to have assumed the ordinary risks of nervous annoyance and irritation that might be reasonably connected with the performance of her duties, but this did not include shocks from an electric current which could be found to have caused pronounced bodily prostration, even if the degree of voltage was not sufficiently high to imperil life.

2. SAME — EVIDENCE. — Evidence examined and *held* that it could have been found that the shock received by the plaintiff was not only unusual in severity, but dangerous, and would not have taken place if the apparatus had not been defective.
3. DUTY OF TELEPHONE COMPANY TO PROVIDE SUITABLE APPARATUS. — It is the duty of a telephone company not only to provide suitable apparatus, but thereafter to maintain it in a state of proper repair so that it can be safely operated.
4. SAME — EVIDENCE OF NEGLIGENCE — QUESTION FOR JURY. — In an action by a telephone operator for injuries resulting from a shock, the failure of the defendant telephone company to keep its apparatus in repair, shown by its defective condition, was evidence of negligence; and if the shock was caused either by want of repair or a proper adjustment of the different parts, the question of the defendant's negligence was for the jury.
5. SAME — PROXIMATE CAUSE. — The argument of the defendant that the injury might have been caused by the negligence of fellow servants, or by some wrongful interference with the system by a stranger, was not relevant where the defendant offered no explanation of this character concerning the accident which the jury could have found was of such a nature that it would not have occurred unless the defendant had permitted the apparatus to become defective.
6. SAME — KNOWLEDGE OF DANGER — QUESTION FOR JURY. — A telephone operator after reporting previous shocks, received while working at a switchboard, continued at work. It was *held* that whether she knew or appreciated the danger was for the jury.

Exceptions by plaintiff from a verdict directed in favor of defendant. *Sustained.*

James H. Sisk, Richard L. Sisk, and *William E. Sisk,* for plaintiff.

Powers & Hall, for defendant.

Opinion by BRALEY, J.:

This is an action of tort for personal injuries received by the plaintiff while at work in the employment of the defendant as a toll operator at its telephone exchange in the city of Lynn. In the superior court at the close of the evidence for the plaintiff, at the request of the defendant, a verdict having been directed in its favor, the case is before us on the plaintiff's exceptions to the ruling. The notice required by Rev. Laws, c. 106, § 75, not having been given the count under the statute was waived, and the case went to trial on the counts at common law. These in substance alleged that the defendant negligently failed to furnish a safe and suitable place in which she could perform her work,

and also had failed to maintain wires, appliances and apparatus in proper condition, and carelessly had allowed them to become defective, whereby the plaintiff while in the performance of her service was injured by receiving a severe shock of electricity. The questions for decision are whether there was evidence of the defendant's negligence, and of the plaintiff's due care, requiring the submission of the case to the jury. The testimony which is reported at length shows that the office used as an exchange was furnished with the usual equipment of wires, transmitters and switch boards, and that under normal conditions neither the instrumentalities, nor the place where they were installed and used were unsafe. But being charged with electricity if either the installation or insulation was defective then upon the wires or the transmitters becoming overloaded the use of the apparatus might be rendered dangerous to the operator. By entering the defendant's employment the plaintiff assumed the ordinary risks of nervous annoyance and irritation that might be reasonably connected with the performance of her duties, but this did not include shocks from an electric current which could be found to have caused pronounced bodily prostration, even if the degree of voltage was not sufficiently high to imperil life. There was evidence that on the night before and during the morning of the day of the accident the plaintiff had reported to the chief operator that while at work on the sixth switch board she had received at times sensations not before noticed, although she previously had used this switch board a part of every day for at least a week, and that these sensations while not producing a shock caused "a jarring and a grinding or rumbling in her ear" which at times caused her head to ache. While at work she sat in front of this switch board attending to calls for the connection of local subscribers with places out of town, and wore upon her head, held in place by a steel spring, a light telephone receiver connected with the switch board by a cord. Upon receiving a call in which she heard the subscriber state the place with which he wished to be connected, there followed, according to her testimony, a sensation of "shocking and grinding * * * and then my head commenced to ache, and then my side hurt me, and then my arms kind of tightened." In response to the question, "Did you lose consciousness then?" she replied, "Well, I don't think I did wholly." It appeared

from the testimony of one of the defendant's chief operators that if complaints were received that shocks of more or less severity were experienced by employees it was his duty to examine into the cause, and remove the difficulty if it could be done, or if not "to report the trouble to headquarters." Notwithstanding there was evidence that disagreeable and annoying noises from the clicking, ringing or buzzing of the apparatus as well as slight shocks were neither uncommon nor dangerous, none of the witnesses testified that these occurrences included the passing of a current of the force described, and it could have been found that the shock received by the plaintiff was not only unusual in severity, but dangerous, and would not have taken place if the apparatus had not been defective. *Doyle v. Boston & Maine Railroad Co.,* 145 Mass. 386, 14 N. E. 461; *Griffin v. Boston & Albany Railroad Co.,* 148 Mass. 143, 19 N. E. 166, 1 L. R. A. 698, 12 Am. St. Rep. 526; *Graham v. Badger,* 164 Mass. 42, 41 N. E. 61; *Carter v. Boston Tow Boat Co.,* 185 Mass. 406, 498, 70 N. E. 933; *Manning v. West End Street Ry. Co.,* 6 Am. Electl. Cas. 329, 166 Mass. 230, 231, 44 N. E. 135; *Melvin v. Pennsylvania Steel Co.,* 180 Mass. 196, 62 N. E. 379; *Wadsworth v. Boston Elevated Ry. Co.,* 182 Mass. 572, 574, 66 N. E. 421. For some time prior to the accident there had been complaints from the plaintiff and other employees to the principal operators that this switch board, or the system controlling the electric current, was not working properly, and attempts had been made by them to find and remedy the difficulty. The making of occasional repairs and replacements required by the daily use and wear of the system could be delegated to servants, but it was the duty of the defendant not only to provide suitable apparatus, but thereafter to maintain it in a state of proper repair so that it could be safely operated. *Rogers v. Ludlow Mfg. Co.,* 144 Mass. 198, 204, 11 N. E. 77, 59 Am. Rep. 68; *Moynihan v. Hills Co.,* 146 Mass. 591, 6 N. E. 574, 4 Am. St. Rep. 348; *Ellis v. Thayer,* 183 Mass. 309, 311, 67 N. E. 325; *Finnigan v. Winslow Skate Mfg. Co.,* 189 Mass. 576, 582, 76 N. E. 192. A failure to perform this duty shown by the defective condition described, would be evidence of negligence, and beyond proof of a defect existing in the apparatus of which the defendant knew, or in the exercise of due diligence ought to have known, the plaintiff was not required to go. If the shock was

caused either by a want of repair, or a proper adjustment of the different parts, the question of the defendant's negligence was for the jury to determine. *Mooney v. Connecticut River Lumber Co.*, 154 Mass. 407, 409, 28 N. E. 352; *Lemery v. Boston & Maine R. R.*, 167 Mass. 254, 257, 258, 45 N. E. 688; *Melvin v. Pennsylvania Steel Co., ubi supra; Droney v. Doherty*, 186 Mass. 205, 207, 71 N. E. 547; *Mehan v. Lowell Electric Light Co.*, 9 Am. Electl. Cas. 797, 192 Mass. 53, 78 N. E. 385.

The argument of the defendant that the injury might have been caused by the negligence of fellow servants, either from a failure of the chief operator, or of the switch board inspector to perform their duty, or that of a workman who upon being directed to repair the defect had performed his work carelessly, or by some wrongful interference with the system by a stranger, is not relevant as the defendant offered no explanation of this character concerning the accident which the jury could have found was of such a nature that it would not have occurred unless the defendant had permitted the apparatus to become defective. *Griffin v. Boston & Albany R. R. Co., ubi supra; Copithorne v. Hardy*, 173 Mass. 400, 401, 53 N. E. 915; *Pinney v. Hall*, 156 Mass. 225, 30 N. E. 1016; *Hofnaeur v. R. H. White Co.*, 186 Mass. 47, 70 N. E. 1038.

It is further contended that by continuing to use the switch board after she had reason to anticipate that something was wrong in the mechanism she assumed by her conduct the risk of any subsequent injury. If after reporting the previous disturbances to those who had been placed by the defendant in charge she continued at work, whether she knew and appreciated the danger was for the jury. *Wagner v. Boston Elevated Ry. Co.*, 188 Mass. 437, 441, 74 N. E. 919; *Peterson v. Morgan Spring Co.*, 189 Mass. 576, 577, 76 N. E. 220; *Moyland v. D. S. McDonald Co.*, 188 Mass. 499, 74 N. E. 929; *Finnigan v. Winslow Skate Mfg. Co., ubi supra; Urquhardt v. Smith & Anthony Co.*, 192 Mass. —, 78 N. E. 410.

Exceptions sustained.

ALLEGHENY COUNTY LIGHT CO. v. BOOTH ET AL.

Pennsylvania Supreme Court — Jan. 7, 1907.

216 Pa. 564, 66 Atl. 72.

1. USE OF STREETS BY ELECTRIC LIGHTING COMPANIES. — A company incorporated under the Act of April 29, 1874 (P. L. 73), was authorized by a city ordinance to erect and maintain poles and wires for the purpose of conducting electricity on such streets of the city as necessary. Said company was not authorized under its original charter to supply light by electricity, and having surrendered its original charter, letters patent were issued to it under the Act of May 8, 1889 (P. L. 136), authorizing it to supply light, heat, and power by electricity. *Held*, that the company had the power under its original ordinance to lay conduits under the sidewalks.
2. SAME — CHANGE OF SYSTEM. — The Act of 1889 (P. L. 136), giving a company the right to alter, inspect, and repair its system of distribution, authorized a change from poles and wires to conduits.
3. SAME — REMOVAL OF CONDUITS. — Where no complaint has been made by a city or by individuals concerning a change by a lighting company to the conduit system for more than six years, equity will not decree the removal of the conduits.

Appeal by the plaintiff from a decree dismissing a bill for an injunction. *Reversed.*

Bill in equity for an injunction to restrain defendants from interfering with a conduit under the sidewalk of the property of Vincent, Scott & Co. Cross-bill for a mandatory injunction for the removal of the conduit. From the record it appeared that Vincent, Scott & Co., by their contractors, Kerr & Fox, were making an excavation for a vault under their sidewalk, and, in doing so, caused a part of the plaintiffs' conduit to fall and break. Plaintiffs claimed a vested right to maintain a conduit under the sidewalk. The defendants denied this right.

The following is the decree of YOUNG, J., of the court below:

"And now, to wit, July 13, 1906, this cause came on to be heard at this term, and was argued by counsel, and upon consideration thereof it is ordered, adjudged, and decreed as follows: (1) The preliminary injunction entered October 24, 1905, is dissolved. (2) The original bill of complaint is dismissed. (3) The Allegheny County Light Company, the defendant in the cross-bill, is ordered and directed, within thirty days from the date hereof,

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Use of Streets by Electric Light Companies — Rights of Abutting Owners to Compensation. — See cases reported and notes thereunder in 8 Am. Electl. Cas. 220–251.

Other cases in this volume relating to the power of a city to regulate the use of the streets by electric light companies. *Merced Falls Gas & Electric Co. v. Turner et al., ante; Cook v. North Bergen Tp. et al., ante; Village of Palestine v. Siler, post.*

to remove its conduit from beneath the sidewalk on the west side of Beatty street, from Penn avenue to Kirkwood street, in the city of Pittsburg. (4) That the Allegheny County Light Company pay the costs of this case."

Before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

David A. Reed and *James H. Beal,* for appellant.

Levi Bird Duff and *L. B. D. Reese,* for appellees.

Opinion by BROWN, J.:

In determining whether the Allegheny County Light Company has the right to construct and maintain conduits under the sidewalks of the streets of the city of Pittsburg for its wires, we must turn to its charter. It was originally incorporated March 6, 1880, under the act of April 29, 1874 (P. L. 73). Assuming that it had the power under its charter to furnish electric light to the public, the city of Pittsburg, by ordinance of October 31, 1881, authorized it "to erect and maintain poles and wires for the purpose of conducting electricity to be used for lighting purposes, on such streets, lanes and alleys of this city as may from time to time be required by said company for the purpose aforesaid." The poles to be erected were to be of such size and shape and located in such places as the city engineer might direct.

But the appellant was not authorized under its original charter to supply light by electricity (Appeal of *Scranton Electric Light & Heat Co.,* 122 Pa. 154, 15 Atl. 446), and, having surrendered its original charter, letters patent were issued to it on May 29, 1889, under the act of May 8, 1889 (P. L. 136), which is a supplement to the Act of 1874. Section 2 of the Act of 1889 is as follows:

"Companies incorporated under the provisions of this act for the supply of light, heat, and power, or any of them, to the public by electricity shall, from the date of the letters patent creating the same, have the powers and be governed, managed, and controlled as follows: Every such corporation shall have the authority to supply light, heat, and power, or any of them, by electricity, to the public in the borough, town, city, or district where it may be located, and to such persons, partnerships, and corporations, residing therein or adjacent thereto, as may desire the same, at such prices as may be agreed upon, and the power also, to make, erect, and maintain the necessary buildings, machinery, and apparatus for supplying such light, heat, and power, or any of them, and to distribute the same, with the right to enter upon any public street, lane, alley, or highway for such purpose, to alter,

inspect, and repair its system of distribution; provided, that no company which may be incorporated under the provisions of this act, shall enter upon any street in any city or borough of this commonwealth until after the consent to such entry, of the councils of the city or borough in which such street may be located, shall have been obtained."

In locating and installing their systems of distributing electricity electric light companies are given by this section the right of eminent domain upon public streets, lanes, alleys, or highways outside of city or borough limits, and, within such limits, they may use the streets with municipal consent. This is a limited right of eminent domain; the limitation upon it being found in the words of the grant of it. *Brown v. Electric Light Co.*, 208 Pa. 453, 57 Atl. 904. The third section of the Act of 1889 provides that "any association of persons or corporations heretofore engaged in the business of supplying light, heat and power, or any of them, by electricity, under color of a charter or letters patent of this commonwealth, issued under the provisions of the act to which this act is a supplement, upon accepting the provisions of this act by writing under seal of the company, filed in the office of the secretary of the commonwealth, and filing therewith its letters patent or charter, which shall be a surrender and acceptance thereof, shall thereupon be a body corporate hereunder and be entitled to and possessed of all the privileges, immunities, franchises and powers conferred by this act upon corporations to be created under the same, and all the property, rights, easements and privileges belonging to said associations and corporations, theretofore acquired by gift, grant, conveyance, municipal ordinance or assignment, or otherwise, upon such acceptance as aforesaid, shall be and hereby are ratified, approved, confirmed and assured unto such acceptors and corporations, with like effect and to all intents and purposes, as if the same had been originally acquired by and under the authority of this act, and such company or corporation shall thereafter be governed by the provisions of this act." The "rights, easements and privileges" which this appellant had acquired from the city of Pittsburg by municipal ordinance under its first charter were ratified, approved, and confirmed with like effect as if they had been acquired under the act of 1889. They are to use the streets, lanes, and alleys of the city for the purpose of distributing electric light. The ordinance is municipal consent to appellant "to enter upon any public street,

lane, alley or highway" within the city of Pittsburg for the purpose stated. This includes sidewalks, which are parts of the streets; and that the conduit of appellant was placed under the pavement in front of appellees' property is not in itself a ground of complaint in this proceeding. The city has the same control over its sidewalks that it has over the driveways. *McDevitt et al. v. People's Nat. Gas Co.*, 160 Pa. 367, 28 Atl. 948; *Provost v. Water Co.*, 162 Pa. 275, 29 Atl. 914.

The right granted by the ordinance of 1881, it is conceded by counsel for appellees, is unlimited as to streets, but it is contended that it was for a specific purpose, viz., "to erect and maintain poles and wires for the purpose of conducting electricity to be used for lighting purposes," and therefore the only privilege that exists is the one clearly and expressly given. This would mean that the city, in giving the right to erect poles and wires, impliedly forbade the use of any other system; but it could not so restrict the right of the company to change its system, for the supreme power of the State gives it the right to "alter" it. True, the permission is to erect and maintain poles and wires, but at the time it was given they constituted the means universally used in distributing electricity; and with what must be regarded as general permission to the appellant to use the streets for its corporate purposes there went, by the express words of the act of 1889, the right "to alter, inspect and repair its system of distribution." In placing its conduits under the sidewalk in front of appellees' property, the appellant simply altered its system of distribution, and in doing so it but exercised a right with which the city could not interfere, unless in the exercise of it there was a violation of reasonable police regulations, adopted by the city for the protection of persons and property from the danger of the new system.

The error into which the learned court below fell was in holding that the "company's sole authority for the occupancy of the highways of the city beneath the surface was the ordinances of November 21, 1892, November 25, 1892, and May 22, 1895." The authority was the ordinance of October, 1881, and the ordinances subsequently passed relating to conduit systems cannot affect the right of the company to alter its original system unless in altering it reasonable police regulations are not complied with.

After consent is obtained to use the streets, the right is to use them in altering any system of distribution. The alteration requires no consent, though in making it the company may be subject to proper police regulations.

Turning to the ordinances of November 21, 1892, November 25, 1892, and May 22, 1895, nothing can be found in them prohibiting a change by the appellant from the pole to the conduit system of distributing electricity. On the contrary, each ordinance encourages, and, as to a portion of the city, requires, the adoption or substitution of the conduit system. Among the provisions relating to the adoption or substitution of this system is section 2 of the ordinance of November 25, 1892, which is as follows:

"Every such corporation, copartnership, or individual before entering upon any of the streets, lanes, alleys, or highways, aforesaid, for the purpose of constructing thereunder, any conduits, subways, apparatus, devices, or means as aforesaid for transmitting, conducting, or conveying electricity, shall file in the office of the department of public works a full plan showing the location, size, and details of such proposed conduits and subways, and all such plans shall be subject to the approval of the chief of the department of public works, or of the committee on public works, and no corporations, copartnerships, or individuals shall enter upon any of the streets, lanes, alleys, or highways aforesaid, or occupy or do any work upon the same until the said plans have first been approved in writing by the said chief of the department of public works, or the committee on public works, or as may be directed by councils, in accordance with the provision of section seventh."

The appellant offered in evidence the plan for its conduit system, which, on July 13, 1899, was approved, in writing, by E. M. Bigelow, director of the department of public works. The court found that other provisions of the ordinances had not been complied with, and, having been of opinion that compliance with them was a condition precedent to appellant's right to construct its conduit system, dismissed its bill and granted the relief asked for in the cross-bill. Whether other provisions of the ordinances are reasonable police regulations, with which the appellant was bound to comply before altering its system in constructing its underground conduits, we need not now determine. In the year 1899 it constructed the conduit of which the appellees now complain. The city of Pittsburg has never complained of its construction. The twenty-four findings in the cross-bill is:

"The Allegheny County Light Company has not been ordered by the director of the department of public works of the city of Pittsburg to take up this conduit or to relay it."

The finding immediately preceding it is:

"It does not appear that any complaint has been made or that any notice has been given or that any action has been taken in regard to the construction or maintenance of its conduit by Vincent, Scott & Co., or any of their predecessors in title from the time of the construction of the conduit in the summer of 1899 until the fall of 1905."

With no complaint either by the municipality or the appellees and their predecessors, as private owners, of the construction of the conduit or of its use for more than six years as a part of appellant's large and expensive system, equity will not now decree its removal. The city has never made complaint of any disregard or violation of police regulations in connection with its construction or use, and it is now too late for either it or the appellees to ask, for the first time, that the appellant be interfered with in its exercising what, in this proceeding, must be regarded as a vested right.

The decrees of the court below are reversed. The cross-bill is dismissed, and it is ordered, adjudged, and decreed that appellant's bill be reinstated, and the appellees are perpetually enjoined from interfering with, displacing, removing, destroying or tampering with the subway and conduit of the appellant mentioned in the bill, and from excavating, digging, or undermining under or about the said conduit, so as to interfere with it, either by themselves, their agents, servants, or employees, the costs on this appeal and below to be paid by the appellees. This decree is without prejudice to the right of the appellant to recover at law any damages which it may have sustained.

CITIZENS' TELEPHONE CO. v. THOMAS.

Texas Court of Civil Appeals — Jan. 14, 1907.

45 Tex. App. 20, 99 S. W. 879.

1. NEGLIGENCE CAUSING DEATH — LIABILITY OF TELEPHONE COMPANY. — A telephone company is liable for negligence resulting in death, under a statute giving such a right of action, where the negligence is that of the corporation itself, as distinguished from that of its agents or servants.
2. DEATH FROM CONTACT WITH TELEPHONE WIRE FALLEN ACROSS ELECTRIC LIGHT WIRE — PRIMA FACIE CASE OF NEGLIGENCE. — Where, in an action for death caused by contact with a telephone wire, it appeared that the defendant telephone company strung its wires above and over the heavily charged wires of a lighting company; that no means were employed to prevent the wires from falling on the lighting company's wires in case of a break; that at 8 o'clock P. M. one of the telephone wires was broken and remained in this condition the next morning; that about 1 o'clock the next morning a mule came in contact with the wire in the street and was injured; that the wire was then wound around a post

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EXPERT EVIDENCE.

1. What Is Admissible.
2. What Is Not Admissible.

1. What Is Admissible. — Expert testimony is admissible for the purpose of showing the number of linemen which should be employed in stringing telegraph wires over feed wires of an electric light company, and as to where such linemen should be stationed. Evidence is also admissible showing the ordinary and usual method existing among telegraph or telephone companies in regard to providing insulators, and as to the number of wires that should be strung at any one time. *Fritz v. Western Union Telegraph Co.*, 8 Am. Electl. Cas. 730, 25 Utah, 263, 71 Pac. 209. An electrical engineer may testify as to the voltage carried by electrical wires, and as to the effect of

by a third person; that, about two hours later, decedent, in hitching his horse to the post, came in contact with the wire and was killed, a *prima facie* case of negligence was made out.

3. DUTY OF TELEPHONE COMPANY AS TO MAINTENANCE OF WIRES. — It is a nonassignable duty of a telephone company to so maintain its system of electric wires that they will not endanger the lives of others or interfere with their lawful use of the streets. If any of the wires happen to be broken, and in such condition become liable to cause injury to others, the company is bound to exercise ordinary care and diligence to ascertain such fact and to remedy the defect.

4. SAME. — Where a telephone wire was so constructed that in falling it would probably fall upon or across the wire of an electric lighting and power company and thereby become dangerous, the telephone company must be held to the same degree of care as though its own wire were charged originally with such current.

5. ACTIONABLE NEGLIGENCE — QUESTION FOR JURY. — In an action for death caused by coming in contact with a broken telephone wire which had become dangerous from crossing an electric lighting wire, it was held that it was for the jury to determine whether the facts constituted actionable negligence.

6. PROXIMATE CAUSE. — Where a telephone company allowed a broken telephone wire, dangerous from contact with an electric lighting wire, to

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Co. v. Monahan, post, 162 Fed. 276. The opinion of an expert as to whether or not deceased received an electric shock before he fell is admissible. *Martin v. Des Moines Edison Light Co., ante*, 131 Ia. 724, 106 N. W. 359. Evidence of an electrical mechanical engineer to the effect that there are well-known methods of preventing grounding so that when the grounding is discovered that portion of the system may be disconnected is admissible. *Harrison v. Kansas City Electric Light Co.*, 195 Mo. 106, 93 S. W. 951. Expert testimony tending to show that electricity could not be transmitted to a trail-car in sufficient quantities to injure a person is admissible. *Denver Tramway Co. v. Reid*, 4 Am. Electl. Cas. 332, 4 Colo. 53. Evidence of experts may be given to show that wires were strung over a bridge in a proper manner. *Nelson v. Branford Lighting & Water Co.*, 8 Am. Electl. Cas. 542, 75 Conn. 548, 54 Atl. 303.

2. What Is Not Admissible. — Expert testimony is not admissible as to the process of stringing a cable on the arms of poles erected for that purpose. *Meehan v. Holyoke St. Ry. Co., ante*, 186 Mass. 511, 72 N. E. 61. Experts should not be permitted to state that locomotor ataxia might result from a shock, where there is no evidence that the plaintiff had symptoms of this trouble. *Harter v. Colfax Electric L. & P. Co., ante*, 124 Ia. 500, 100 N. W. 508. A witness, not called as an expert, should not be permitted to testify as to the result of an experiment with a piece of insulated wire similar to a feed wire in question. *United Electric L. & P. Co. of Baltimore v. State, etc., ante*, 100 Md. 634, 60 Atl. 248. The testimony of a lineman, who has not sufficiently qualified, as to the duty of a telephone company to use guard wires, is not admissible. *Hand v. Central Penn. Telephone & S. Co.*, 1 Lack. L. News, 351. And a witness, who has not shown himself to be an expert, cannot testify as to whether an employee was doing his work in a proper manner. *Brush E. L. & P. Co. v. Wells*, 103 Ga. 512, 30 S. E. 533.

remain in the street, and a passer-by, after a mule had been injured, wound the wire about a post, and the decedent, in hitching his horse to the post, received a fatal shock, the negligence of the company and not the act of the passer-by was the proximate cause of the accident.

7. EVIDENCE. — Evidence examined and held that it conclusively established the fact that decedent's death was caused by contact with a live wire.

8. SAME — EXPERT TESTIMONY. — It was not error to ask an expert the following preliminary question: "As a man familiar with electrical work, is there a method by which wires of an upper system can be prevented from falling on the wires of a lower system?"

Appeal by defendant from a judgment for plaintiff. *Affirmed.*

G. W. Allen and *Baker, Botts, Parker & Garwood,* for appellant.

Hutcheson, Campbell & Hutcheson, for appellee.

Opinion by REESE, J.:

Eliza Thomas brings this suit against the Citizens' Telephone Company of Texas to recover damages on account of the death of her husband, Jesse Thomas, alleged to have been caused by coming in contact with one of defendant's wires on Washington street in the city of Houston, which was broken and down. From a verdict and judgment in favor of plaintiff for $2,000, defendant appeals.

By the first assignment of error appellant complains of the action of the court in refusing a requested charge to find a verdict for defendant. The first proposition under this assignment is as follows: "A private corporation of the character of appellant is

was occasioned by the negligence of the corporation, in regard to some duty which it owed to the public and which it had not assigned or could not assign to an agent in such a manner as to avoid liability for the consequences, the charge should have been given.

The petition alleges that:

"The defendant recklessly, negligently, and in total disregard and violation of its duty to maintain its wires so as not to interfere with travel on the streets of the city, permitted one of its wires on Washington street, one of the main thoroughfares in the city of Houston, at and directly in front of Halverton's grocery store, which store many persons frequented, to part or become severed, the exact manner of parting or severance plaintiff is not able to state, so that a loose end resulting from such parting fell toward the ground, where it constituted a dangerous menace to any persons going and being in that vicinity, and especially those who traded at Halverton's store, because the said wire in falling fell across and came in contact with and was suspended over the wires of the Houston Lighting and Power Company, strung and suspended along on lower poles on or about that point beneath the wires of defendant company; the said hanging wire thereby becoming highly charged and potent with death to all persons who should come in contact with it. And said defendant company permitted said wire to remain down and out of its proper place for several hours, and to constitute a continuing menace to the lives of such of the public as were accustomed to pass or be at or near that point, and especially plaintiff's husband, Jesse Thomas, and others who traded at Halverton's store."

The evidence establishes the following facts: The wires of appellant were strung on poles above and over the wires of the lighting and power company in such a way that in case of a break in appellant's wire it would fall upon the wires of the lighting and power company. No means were used to prevent the wire from falling upon the wires of the lighting company in case of a break. Appellant's wire carried a very light current of electricity, not sufficient to injure a person coming in contact with it; but the wires of the lighting and power company carried a very heavy current, sufficient to cause the death of any person who should come in contact therewith. As early as 8 o'clock P. M. on December 25th, the wire of appellant in question on Washington street was broken and lay upon the street near Halverton's store. About 6 o'clock A. M. on the 26th a mule being driven along the street came in contact with the fallen wire and was knocked down and slightly injured. Otto Lutz broke the wire and extracted the mule, and, in order to remove the wire from the street where it lay, wrapped it around a post to which was attached a guy wire of the lighting and power company. About two hours afterwards

Jesse Thomas, in hitching his horse to this post, came in conta with the wire and was killed. The wire in falling had falk upon the wires of the lighting and power company, and w thereby charged with sufficient of the current of those wires cause death to any one coming in contact with it.

These facts made a *prima facie* case of actionable negligen against appellant. Keasby on Elec. Wires, § 231 *et seq.; Hayn v. Raleigh Gas Co.* (N. C.), 5 Am. Electl. Cas. 264, 19 S. E. 34 26 L. R. A. 810, 41 Am. St. Rep. 786; *Boyd v. Portland Ele Co.* (Or.), 7 Am. Electl. Cas. 605, 66 Pac. 576, 57 L. R. A. 62 *Elec. Light & Power Co. v. Ruddy* (N. J.), 41 Atl. 712, 57 L. R A. 624; *Uggla v. St. Ry. Co.,* 4 Am. Electl. Cas. 389, 160 Mas 351, 35 N. E. 1126, 39 Am. St. Rep. 481; *Hutchison v. Bosto Gaslight Co.,* 122 Mass. 219. It was its duty to maintain i system of electric wires so that they should not endanger the liv of others or interfere with their lawful use of the public highwa It was its duty primarily to keep its wires off of the street whe persons would likely come in contact with them; and if by an chance any of its wires should happen to be broken, and in suc condition become liable to cause injury to others, it was its dut to exercise ordinary care and diligence to ascertain such fact an to remedy the defect. These duties come under the head of no assignable duties, the negligence in the performance of which wa the negligence of the appellant; and, if death resulted by reaso thereof, appellant cannot escape the consequences upon the ple that such negligence is due to the fault of its agents or servants

that this duty embraced nothing more than to make such examination of the wires as they could from the ground, as they went about adjusting such troubles as were reported. One such inspector or trouble man had charge of all the wires of appellant in the First, Sixth, Third, and Fifth wards of the city of Houston. By the rules of the company the wire chief and inspectors went off duty at 5.30 P. M., and did not come on again until 7.30 A. M., and during the interval there was no one to whom any defect or accident to any of the wires could be reported, nor whose duty it was to discover or remedy it. The evidence was sufficient to support the inference of negligence both in the original breaking and in the delay in discovering and removing the dangerous wire, and there is no suggestion in the evidence that such negligence was due to any fault on the part of any agent or servant of appellant, if such fact would exonerate it from liability. The telephone wire was so constructed as rendered it probable, if not inevitable, that in falling it would fall upon or across the wire of the lighting and power company and become charged with a sufficient current of electricity from this source to make it dangerous, and under the circumstances appellant must be held to the same degree of care as though its own wires were charged originally with such current. *Tel. Co. v. Robinson,* 50 Fed. 810, 1 C. C. A. 684, 16 L. R. A. 545; *Ahern v. Oregon Tel. Co.,* 4 Am. Electl. Cas. 349, 24 Ore. 276, 33 Pac. 403, 35 Pac. 549, 22 L. R. A. 635. The place was a very much used street in a populous and busy city, and the wire was allowed to remain in this dangerous condition from 8 o'clock P. M. to 8 o'clock A. M. the next morning, at which time Thomas was killed. It is true that appellant was only required to use ordinary care, but such care must be proportioned to the circumstances of the case and the character and extent of the danger. *Railway Co. v. Smith,* 87 Tex. 354, 28 S. W. 520; *Harroun v. Brush Elec. Light Co.* (Sup.), 6 Am. Electl. Cas. 357, 42 N. Y. Supp. 716; *Haynes v. Raleigh Gas Co.* (N. C.), 5 Am. Electl. Cas. 264, 19 S. E. 344, 26 L. R. A. 813, 41 Am. St. Rep. 786. It was for the jury to determine whether the facts constituted actionable negligence.

It is further insisted, under this assignment, that, not the negligence of appellant, but the act of Lutz in taking the wire up out of the street, was the proximate cause of the death of

Thomas. This contention cannot be sustained. Given the circumstance of the wire lying in the street, an obstruction, and as shown by the accident to the mule a dangerous obstruction, to travel, it was reasonably to be anticipated as a thing likely to occur that some thoughful and considerate passerby would take up the wire and endeavor to put it out of the way. It would be absurd to hold that appellant had a right to assume that the fallen wire would be allowed to remain upon the street, and that it could not reasonably anticipate that some one would remove it. *Seale v. Railway Co.,* 65 Tex. 278, 57 Am. Rep. 602; *Hayes v. Hyde Park* (Mass.), 27 N. E. 522, 12 L. R. A. 249; *Lundeen v. Livingston Light Co.,* 6 Am. Electl. Cas. 322, 17 Mont. 32, 41 Pac. 995. There is no analogy between this case and *Mars v. Delaware Canal Co.,* 54 Hun, 625, 8 N. Y. Supp. 107, cited by appellant, where a person wilfully and recklessly, if not maliciously, started an engine left on a side track where it could do no possible harm.

It is further contended under this assignment that the evidence did not tend to show that Thomas' death was caused by coming in contact with the wire. The evidence establishes this fact almost conclusively. Thomas was seen by a person standing near to approach the post and to put his arms around it in the attempt to tie his horse. As he did so, he threw up his hands and fell backward; his death being practically instantaneous. No other cause of his death is remotely suggested by the evidence. The evidence made a proper case for the jury as to the liability of appellant and the court did not err in refusing the requested instruction to find for defendant.

Nothing in the pleadings or the evidence suggests that the breaking of the wire, or allowing it to remain for so long a time in the dangerous condition in which it was, was due to the negligence of any agent or servant of appellant. If there was negligence, it was clearly and indisputably the negligence of the appellant itself and not that of any of its agents. The court did not err in refusing to submit this issue to the jury as requested by appellant. In the case of *Cole v. Parker* (Tex. Civ. App.), 68 S. W. 136, cited by appellant, the refusal of such a charge was held error on the ground that plaintiff had charged negligence of the defendant and their employees. There is no such charge here. The second

and third assignments of error presenting the point are overruled.

Appellant sought, by requested instruction, to have submitted to the jury the issue of proximate cause, upon the theory (1) that the independent act of Lutz intervened to break the causal connection between appellant's negligence, if any, and the accident, and (2) that the fact that the wire in falling fell upon the wires of the lighting and power company, and thus became charged with a dangerous current of electricity, could not have been reasonably anticipated by appellant. Appellant requested three special charges, covering these points, which were refused, and their refusal is made the basis of the fourth, fifth, and sixth assignments of error. The first of said charges instructed the jury, if they believed that the act of Lutz in removing the wire was an independent act, but for which the injury would not have been received, plaintiff would not be entitled to recover unless such act, or some similar act, could have been foreseen by a person of ordinary prudence. The second of said requested charges presents generally the doctrine of proximate cause. The third presents the issue of proximate cause in the matter of foreseeing as likely to occur that the wire of appellant in falling would fall upon those of the lighting and power company and become thereby charged with a dangerous current of electricity. There was no error in refusing these charges. The court instructed the jury generally upon proximate cause. The undisputed evidence shows that the act of Lutz, and the falling of the wire of appellant upon the wires of the lighting and power company, strung immediately under it, in case such wire broke and fell, were consequences which appellant was bound to foresee as likely to occur under all the circumstances. The evidence did not raise an issue upon these points.

Appellant requested the following charges:

"The defendant contends in this case, and has introduced some evidence before you tending to show, that Jesse Thomas, deceased, had abandoned the plaintiff prior to his death, with the intention to remain permanently away from her. If you should find, from the preponderance of the testimony, that the said Jesse Thomas had abandoned the plaintiff, with the intention to permanently remain separated from her, then you are charged that you may take such fact into consideration in determining what amount, if any, you should allow plaintiff as a fair compensation to her for the pecuniary loss, ny, sustained by the death of the said Jesse Thomas, and unless you ", from the testimony, that she has sustained pecuniary loss by his u will return a verdict for the defendant."

"You are charged that, in determining the amount to which the plaintiff in this case would be entitled to recover, you will not take into consideration anything except what you should find, from the evidence, would compensate her for her pecuniary loss, if any, sustained by the death of the said Jesse Thomas, and, if you should believe that she sustained no pecuniary loss, you will return a verdict for the defendant."

The evidence showed that the relations between Thomas and appellee, his wife, were not, at the time of his death, entirely harmonious. Some of the evidence tended to show a separation, tending to be permanent. This was contradicted by other evidence which tended to show that there had been, and was at the time of Thomas' death, no serious break in their marital relations, and that Thomas continued to visit his wife and to contribute to her support. Upon this issue the court charged the jury as follows:

"If you find for plaintiff, you will take into consideration all the facts and circumstances in evidence concerning her husband, and the relations existing between her and him, and will allow her such sum as will, if paid now, fairly compensate her for the pecuniary damage and loss which you believe she has sustained by reason of the death of her husband; but, in assessing such damages, you will not take into consideration or allow any compensation to her as a solace for her grief or for the loss of the companionship of her husband. If you find for the defendant, you will say so, and no more."

We think the charge was as full and specific as was necessary. It is substantially the same as the second of the requested instructions quoted above. The evidence upon this point was conflicting, preponderating rather against the theory of abandonment. Appellant does not controvert the authority of *Railway Co. v. Spicker*, 61 Tex. 430, 48 Am. Rep. 297, but contends that the jury should have been instructed that they could take into consideration the evidence upon this point in determining whether or not appellee had sustained pecuniary damage by reason of the death of her husband and the amount of such damage. This, we think, was sufficiently done by the charge of the court above quoted.

There was no error in overruling the objection of appellant to the question propounded to the witness Flavin by appellee. This question was as follows:

"As a man familiar with electrical work, is there a method by which wires of an upper system can be prevented from falling on the wires of a lower system?"

The objection was that it called for an answer that was immaterial and irrelevant and merely the opinion of the witness upon

a matter upon which the jury was qualified to pass. The witness answered: "Yes, sir; it can be put up that way." The witness was being examined as an expert, and the objection that the question called for his opinion was not tenable. Standing alone the answer might be said to be immaterial, in that appellant could not have been required to make use of appliances to prevent its wires from falling upon those of the lighting and power company, unless such appliances were practicable; but the court did not err in allowing the question to be asked as a proper and necessary preliminary to further interrogatory as to the practicability of such appliances. There being no further evidence upon this point, appellant should have moved to strike out the answer, or otherwise had it withdrawn from the jury. The objection that the evidence was not relevant to any issue raised by the pleadings cannot be sustained.

After charging the jury as to the measure of duty of appellant in stringing its wires and in keeping them in reasonably safe condition, the court instructed them:

"The defendant was presumed in law to have that knowledge of the condition of its wires which it could have had by the exercise of that degree of care, prudence, and diligence that an ordinarily prudent person would have used under the same or similar circumstances."

The objections to this charge, in the tenth assignment of error, are not sound. The charge quoted is a correct statement of the law, and was called for upon the issues raised by the pleadings and evidence. It cannot be said that it conveys to the jury the impression that, in the opinion of the court, some knowledge of the condition of the wires could have been obtained by appellant by the exercise of ordinary care, any further than that any charge upon an issue would have that effect. The assignment cannot be sustained.

The eleventh assignment of error assails the charge of the court instructing the jury upon the issue of negligence "in the matter of maintaining the wires in proper condition, or in permitting the wire to fall, or in permitting it to remain down and out of place." It is contended by appellant that the petition does not charge negligence in maintaining the wire in proper condition, but only in permitting it to fall and remain down. We think that the charge of negligence in permitting the wire to fall and remain down fairly

included the charge of negligence in the matter of maintaining the wires in proper condition. The jury could not have understood, from the charge, that any other element of negligence was submitted to them than those alleged in the petition.

The same answer may be made to the objection to the charge as set out in the twelfth assignment, upon the issue of negligence in permitting the wire to remain around the guy post after it had been placed there by Lutz. This was necessarily included in the charge of negligence in permitting the wire to remain down.

The thirteenth assignment of error, complaining of the charge of the court as to the relations existing between appellee and her husband, and which has been set out in full in this opinion, is without merit. It does not assume the existence of any controverted fact, as contended by appellant.

By the fourteenth assignment of error appellant complains of the refusal of a requested charge, as follow:

"You are charged that, if you believe from the evidence that, at the time the said Jesse Thomas came to Halverton's store, and to the place where he came in contact with the telephone wire, if he did so come in contact with the same, it was daylight, and the said Jesse Thomas saw, or in the exercise of ordinary care ought to have seen, the wire before touching the same, and if you believe that in touching said wire, if he did so touch the same, the said Thomas failed to use that degree of care which a man of ordinary prudence would have used under the same circumstances, and that but for this want of care on his part the accident would not have happened, you will return your verdict for the defendant."

It is admitted that the court gave a charge upon contributory negligence based upon the requested charge, and substantially the same, except that the words "it was daylight" were stricken out. The assignment is without merit.

The fifteenth and sixteenth assignments of error present the objections that the verdict is against the great weight and preponderance of the evidence and is excessive in amount. We overrule both assignments without further comment.

We find no error in the record, and the judgment is affirmed.

Affirmed.

BENSON v. AMERICAN ILLUMINATING CO.

New York — Steuben County — Jan. 21, 1907.

102 N. Y. Supp. 206.

ELECTRIC LIGHT COMPANIES — DEFECTIVE WIRING BY CUSTOMER — RIGHT OF COMPANY TO SHUT OFF CURRENT. — Where an electric light company had wired a dentist's office, and the dentist had made defective and dangerous connections therewith, and had refused to make such connections safe, the light company cannot be held liable for shutting off the current.

Appeal by defendant from a judgment of a Justice's Court in favor of the plaintiff. *Reversed.*

Orcutt, Robbins & Brown, for appellant.

Whiteman & Hill, for respondent.

Opinion by BURRELL, J.:

This action is brought by the plaintiff, who is a dentist by profession, against the defendant, for damages occasioned by the defendant company in refusing to furnish the plaintiff electric light for the period of about nine days. The evidence shows that about the middle of June, 1905, on the application of the plaintiff, the defendant installed a meter in the plaintiff's place of business, in the city of Hornell, N. Y., did necessary wiring, and made connections with a bull's-eye reflecting light which the plaintiff then had and used in front of his dentist chair, for use on dark days and at night, for illuminating a patient's mouth. Subsequently the plaintiff did some wiring himself, beyond this light to a sign out of a window and to a lathe, and which was a live wire beyond this light when the switch was open. Subsequently the defendant informed the plaintiff that the wiring he had done himself was defective and dangerous; that the connection near the chair used by patients was liable to set a lady's dress on fire. The defendant thereupon cut off the defective wiring, and the plaintiff then agreed not to connect up the defective wiring again, but subsequently did so, by making slight changes, and also attached two more wires back of the bull's-eye light connected up by the defendant and near the meter, and was again on two occasions informed by the defendant, in effect, that the wiring was defective and dangerous and liable to set the building on fire and requested

to remedy the same, which the plaintiff on the last occasion refused to do, and on November 21, 1905, the defendant, finding the wires still remaining in the same condition, shut off the electricity, and the plaintiff was without electric light for the space of about nine days; the light being again turned on by the defendant after service on it of a notice in writing under section 65 of the transportation corporations act.

It would seem to me from the evidence in this case that the plaintiff had a duty to perform in seeing to it that the wires he had attached and which carried the electricity around his office were made safe, and especially so when his attention had been repeatedly called to the fact that his wiring was dangerous and liable to set a patient's dress on fire as well as the building. Under such circumstances it was his duty to have made it safe, without waiting for interference on the part of any other person, and, when the plaintiff failed to do so, it became the duty of the defendant, the defendant having full knowledge of the dangerous conditions existing, to see to it that no one was injured by the electricity which it produced and sent through these defective wires.

If the plaintiff suffered the loss of work during the period the light was off, he contributed to it by absolutely refusing to put his wires in proper condition to be safely used. In the case of *Isaac Thomas, Administrator, v. Maysville Gas Company, Impleaded, etc.* (Ky.), 7 Am. Electl. Cas. 588, 56 S. W. 153, 53 L. R. A. 147, which holds "that a corporation which generates and sends electricity into the wires of a street railway company is chargeable with the duty to see that such wires are properly insulated, and it, as well as the street railway company, is liable for failure to perform that duty, if a person is killed because the wires are not properly insulated," the principle is the same as the case at bar. In the case at bar the defendant is a corporation generating and sending electricity into its wires as well as the wires belonging to others. It was sending its electricity into the defective wires of the plaintiff, knowing the wires to be defective and dangerous to persons coming in contact therewith as well as to the building in which they were located, and it was the duty of the defendant to remove the danger when the plaintiff refused so to do.

In the case above cited the Maysville Gas Company generated and furnished the electricity to the Maysville Railway Company, and delivered it into the wires of the street railroad company, and on the occasion of accident, by virtue of the wires owned by the street railway company, the question was squarely presented as to which company was liable, and the court there says:

"That there was a duty imposed by law upon the street railway company to keep its wires properly insulated, so that those whose business or pleasure brought them in dangerous proximity to them might be protected from the deadly current which they conducted, cannot be questioned. Without the electric current which the gas company sent through them, contact with them was harmless. When so charged, they became instruments of death, threatening the lives of those who, perchance, came in contact with them. Did the fact that the gas company supplied the harmless wires with the force which converted them into a death-dealing agency make it responsible for the injury which resulted in the death of the intestate? The exact question submitted has not, so far as we are aware, been answered by any court of last resort. * * * By the machinery in use by the gas company it produced and controlled the electricity. It is presumed to and did know the dangerous force it was putting in motion. * * * Knowing the dangerous character of the force it supplied, it was bound to use the care commensurate with the danger of its employment. * * * Considering the dangerous character of the force produced by the gas company, there was a duty imposed on each to see that the wires into which it was sent were properly insulated. * * * When one through the instrumentality of machinery can * * * produce such a deadly force as electricity, he should be compelled to know that the means of its distribution are in such condition that those whose business or pleasure may bring them in contact with it may do so with safety."

In the case of *McLaughlin v. Louisville Electric Light Co.* (Ky.), 6 Am. Electl. Cas. 255, 37 S. W. 851, 34 L. R. A. 812, the court said:

"Electricity is a powerful and subtle force, and its nature and manner of use not well understood by the public; nor its presence easily determined or ascertained. * * * The daily avocation of many thousands of necessity bring them near to this subtle force, and it seems clear that the electric companies should be held to the use of the utmost care to avoid injuring those whose business or pleasure requires them to come near such a death-dealing force."

In the case at bar no one was injured, but on the broad ground taken by the cases cited it would seem that the defendant company was clearly within its rights when it refused to longer allow its electricity to run through these defective wires and thus avoid any possible liability of fire or accident to any person on its part, and from the evidence it would seem that the defendant did all

in its power to induce the plaintiff to remedy the defects and make the wires safe, and only turned the current off as a last resort after the absolute refusal of the plaintiff so to do; the defendant company understanding the nature of the force they were generating and the dangerous condition of the wiring, and the damage liable to result both to person and property therefrom if longer continued. There was no wilful refusal by the defendant to furnish electricity under proper conditions.

From the evidence on the trial there was no question but that the wiring was dangerous. It had been examined by the chief of the fire department and fire warden of the city, who pronounced it dangerous. The defendant company before turning on the current again took the precaution of notifying the owner of the building as well as the fire warden. I think whatever damage the plaintiff suffered by being deprived of this light was largely his own fault, and not the fault of the defendant.

The conclusion arrived at from the cases cited makes it unnecessary to consider the other questions urged on the argument.

The judgment of the court below should be reversed, with costs. Ordered accordingly.

POLITOWITZ v. CITIZENS' TELEPHONE CO.

Missouri — Kansas City Court of Appeals — Feb. 4, 1907.

123 Mo. App. 77, 99 S. W. 756.

INJURY FROM CONTACT WITH TELEPHONE WIRE FALLEN ACROSS RAILWA WIRE — INSTRUCTIONS. — In an action for injuries received by conta with a telephone wire which had broken and fallen across a dangerousl charged wire of a railway company, the petition alleged that defendant wires were not properly insulated; that they were not substantially a tached to the poles; that they were strung immediately above and i close proximity to the wires of a railway company, so that they woul likely come in contact with said wires, and would be charged and cause to burn, break, and fall from their fastenings; that plaintiff inadver ently came in contact with said wires and was injured. It was hel that it was proper to instruct the jury that if defendant maintained it wires directly above the railway wires, and knew or ought to hav known that the railway wires were charged with a current of high vol age, then it was the duty of the defendant to use such care as would b commensurate with the circumstances and conditions to prevent its wire from coming in contact with said railway wires or to insulate its wire

and if defendant failed to use such care as a reasonably prudent person would have used to fasten its said wires, and a wire did fall across the railway wire and plaintiff was thereby injured, a recovery should be had.

Appeal by defendant from a judgment for plaintiff. *Affirmed.*

Vinton Pike and *Geo. W. Groves,* for appellant.

W. K. Amick, Frank Harl, and *Eugene Silverman,* for respondent.

Opinion by BROADDUS, P. J.:

The appellant is here without an abstract of any of the evidence in the case and asks us to review the action of the court in giving certain instructions on behalf of plaintiff and refusing to give certain other instructions asked by defendant.

It is contended that instruction numbered 2, given at the instance of plaintiff, is not within the issues of the pleadings. The instruction is as follows:

"If the jury believe from the evidence that defendant constructed or maintained its telephone wires directly above the wires of the railroad company mentioned in evidence, and that said wires of the railway company at Twentieth street were charged with a current of high voltage, and that the defendant knew or ought to have known said fact, then it was the duty of the defendant to use such care as would be commensurate with the circumstances and conditions to prevent its wires from coming in contact with said railway wires or to insulate its wires, so that, if they did come in contact with said railway wires, the electricity would not be transmitted upon defendant's wires, and if the jury believe that the defendant failed to use such care as a reasonably prudent person would have used to fasten its said wires so that they would not fall, and if because of that fact the defendant's wires did fall upon the railway wires, and that defendant's said wires were not insulated and in falling came in contact with the railway wires and became charged with a current of electricity of high voltage, and being so charged hung down in the street, and the plaintiff while walking upon the street came in contact with the defendant's said wires, not knowing the danger, and was injured thereby, then the verdict of the jury should be for the plaintiff."

The allegations of the petition in general are that defendant's wires being charged with a dangerous amount of electricity were carelessly and negligently constructed, maintained, and operated.

Among the specific allegations of negligence are the following: That defendant's wires were not properly insulated; that they were not substantially attached to the poles; that they were strung im-

mediately above and in close proximity to the wires of the St. Joseph Light, Heat & Power Company, which were highly charged with electricity, and in close proximity to the wires and iron lamp frame of the city of St. Joseph at Eighteenth and Olive streets, which was also conducting currents of electricity, so that they would likely come in contact with said wires and iron frame and would be charged with electricity and caused to burn, break, and fall from their fastenings. The petition then proceeds to state that by reason of the alleged acts of negligence defendant's wires fell on the wires of the said railway company, became charged with electricity, and fell to the ground, and that plaintiff inadvertently came in contact with the same and was injured. It seems to us that the instruction is clearly within the issues raised by the pleadings, as it predicates plaintiff's right to recover specifically upon the said allegations.

The defendant further insists that there was no evidence to support the instruction. As no part of the testimony is abstracted, defendant seeks to show the fact by the ingenius expedient of referring to the action of the court in giving an instruction that its wires were not placed negligently in proximity to the said railway wires. This is a novel way of getting the evidence on trial before an appellate court. And it is possible for the court by process of reasoning a priori to get an idea of what the evidence was; but we do not care to venture upon the experiment. Besides, we are not required to do so. The law requires that the appellant should produce his evidence.

Other errors assigned as to the action of the court in giving and refusing instructions cannot be considered intelligently for a similar reason. The case was of a complicated character, owing to the alleged cause of injury. We have before us only the pleadings and the instructions, and as the instructions are directed to the issues, in the absence of the testimony to show that there was error, we are bound to presume that there was not.

Affirmed.

ELLISON, J., concurs. JOHNSON, J., not sitting.

EVANS v. EASTERN KENTUCKY TELEPHONE & TELEGRAPH CO.

Kentucky Court of Appeals — Feb. 14, 1907.

124 Ky. 620, 99 S. W. 936.

1. DAMAGE FROM LIGHTNING ENTERING HOUSE OVER TELEPHONE WIRE — ACT OF GOD. — In an action for damages caused by lightning entering a house over telephone wires left connected with the house by the defendant company, it was held that while lightning was the act of God, the carrying of the lightning into the plaintiff's house was the act of the defendant.
2. SAME — DEGREE OF CARE QUESTION FOR JURY. — It was a question for the jury whether the defendant telephone company had used such care as might be reasonably expected of a person of ordinary prudence under the circumstances.
3. SAME — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. — Where the plaintiff had ordered the defendant to take out both the telephone box and the wires, it was a question for the jury whether he, by his want of care, contributed to the loss, or acquiesced in the wires remaining in the house when he knew, or by ordinary care should have known, the danger.

Appeal by plaintiff from a judgment in favor of defendant. *Reversed.*

S. P. Stamper, for appellant.

Henry Watson, for appellee.

Opinion by HOBSON, J.:

Lewis Evans owns a house and lot in the town of Proctor, Lee county, Ky. In August, 1902, he made a contract with the Eastern Kentucky Telephone & Telegraph Company by which it placed a telephone box in his house connected by wire to the defendant's exchange, and he agreed to pay it the sum of one dollar a month for a period of twelve months for the use of the telephone. At the end of the year he notified the telephone company to remove the telephone box and wires from his house. It took out the telephone box, but failed to remove the wires, simply cutting them loose from the telephone box and leaving them in the house. Thus things stood until July 10, 1904, when there was a severe

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Lightning Entering Building over Telephone Wires. — See note to 8 Am. Electl. Cas. 591–610.

Other cases in this volume relating to injuries from lightning entering buildings are collected in note to *Wells v. N. E. Telephone Co., ante.*

thunderstorm and the lightning struck a locust tree not far from Evans' house to which the wire of the telephone company was attached. The lightning tore up the tree and passed along the wire into the house, tearing up the room in which the wires had been left and damaging the property. The wires had remained in his house about ten months after the telephone box was taken out before the house was struck by lightning. During this time Evans knew that the wires were still in the house, but did not request the telephone company to take them out, not knowing that it was dangerous for the wires to remain attached to the house after the box had been taken away, this being the first experience he ever had with a telephone. He sued the company for damages to the house, charging that the loss was due to its negligence. The defendant filed an answer denying the allegations of the petition. On the trial the plaintiff proved, in substance, the facts we have stated. The court peremptorily instructed the jury to find for the defendant. This was done, and, judgment having been entered dismissing the plaintiff's petition, he appeals.

It is insisted that the loss was due to the act of God, and that the plaintiff was as much responsible for the trouble as the defendant. While lightning is the act of God, the carrying of the lightning in the plaintiff's house on its wire which it had left in the house was the act of the defendant, and it was a question for the jury whether the defendant had used such care as might be reasonably expected of a person of ordinary prudence under the circumstances. The plaintiff had ordered the defendant to take

where damage from lightning occurs through its failure to remove its wires when the person living in the house has ceased to subscribe for a telephone."

Judgment reversed, and cause remanded for a new trial.

TEMPLE v. MCCOMB CITY ELECTRIC LIGHT & POWER CO.

Mississippi Supreme Court — Feb. 18, 1907.

89 Miss. 1, 42 So. 874.

1. ELECTRICITY — CARE REQUIRED IN HANDLING. — Corporations handling the dangerous agency of electricity are bound, and justly bound, to the very highest measure of skill and care in dealing with such a deadly agency.
2. WIRES IN TREES — NOTICE OF HABIT OF SMALL BOYS TO CLIMB TREES. — The immemorial habit of small boys to climb little oak trees filled with abundant branches reaching almost to the ground is a habit which corporations stretching their wires over such trees must take notice of.

Appeal by plaintiff from a judgment sustaining a demurrer. *Reversed.*

Action by Willie Temple, a child ten years of age, for damages for injuries alleged to have been received by coming in contact with a live wire of defendant. The declaration alleges that the defendant, in transmitting electricity, which it knew to be a dangerous agency, through a thickly settled part of McComb City, had negligently removed the insulation from its wires at a place where said wires passed through a tree which had numerous branches extending almost to the ground, and in which plaintiff and other children played, and that by reason of the removal of the insulation from said wires they thereby became dangerous, while, if properly insulated, they would have been harmless, and that plaintiff, being ignorant of their dangerous condition, while climbing among the branches of said tree, came in contact with that part of said wires from which the insulation had been removed, and received the injuries complained of. The defendant demurred on the ground that the declaration does not allege (1) that the defendant had reason to believe that said wires were so constructed and in such place and manner as to result in injury to plaintiff or any one else; (2) that it was through the fault of defendant that plaintiff was injured, but that, on the other hand, shows that it was through the fault of plaintiff that said accident occurred. The court sustained the demurrer, and plaintiff appeals.

Care Required of Electrical Companies. — See note to *Guest v. Edison Illuminating Co., post.*

Attractive Nuisances. — As to when the stringing of electric wires constitutes a nuisance attractive to children, see *Mayfield Water & L. Co. v. Webb's Adm'r, post.*

Quin & Williams and *F. H. Lotterhos,* for appellant.

Mixon & Butler, for appellee.

Opinion by WHITFIELD, C. J.:

The citizens of a municipality have the right to the reasonable use of the streets, not only on their surface, but above their surface. Many uses of the streets, or the spaces above the streets, may be readily imagined in cities, where buildings are erected twenty to fifty stories high, that might not be available in an ordinary town. The corporations handling the dangerous agency of electricity are bound, and justly bound, to the very highest measure of skill and care in dealing with these deadly agencies. The appellee had the right to such reasonable use of the streets for its poles and wires as the conditions existing at the time in the community warranted. On the other hand, the appellant had the reciprocal right to what was a reasonable use of the streets on his part. The rights of the appellant and the appellee are mutual and reciprocal. Neither could so use his own rights as to wantonly injure the other. These two correlative rights, if the law is obeyed, operate in perfect harmony with each other. There are no interferences, and no vacancies in the sphere of their harmonious movement.

The declaration shows that the tree in which this boy was injured, by contact with an uninsulated wire, was an oak tree, a little tree abounding in branches extending almost to the ground; just such a tree as the small boys of any community would be attracted to, and use, in their play. Whether this appellee knew that this particular small boy was in the habit of climbing this tree or not, it is clear from the averments of the declaration that it did know the tree, the kind of tree, and, knowing that, knew that any person of practical common sense would know — that it was just the kind of a tree that children might climb into to play in the branches. It is perfectly idle for the appellee to insist that it was not bound to have reasonably expected the small boys of the neighborhood to climb that sort of tree. The fact that such boy would, in all probability, climb that particular tree, being the kind of tree it was, was a fact which, according to every sound principle of law and common sense, this corporation must have anticipated. The argument that it did not almost suggests the query

hether the individuals composing this corporation, its employees nd agents, had forgotten that they were once small boys themelves. The immemorial habit of small boys to climb little oak rees filled with abundant branches reaching almost to the ground is a habit which corporations stretching their wires over such trees must take notice of. This court, so far as the exertion of its power in a legitimate way is concerned, intends to exert that power so as to secure, at the hands of these public utility corporations, handling and controlling these extraordinarily dangerous agencies, the very highest degree of skill and care.

The judgment of the court below is reversed, the demurrer overruled, and the cause remanded.

GLOUCESTER ELECTRIC CO. v. DOVER.

United States Circuit Court of Appeals, First Circuit — Feb. 18, 1907.

153 Fed. 139.

1. INJURY TO TELEPHONE LINEMAN FROM CONTACT WITH ELECTRIC LIGHT WIRE — ASSUMPTION OF RISK — DUE CARE. — In an action by a telephone lineman against an electric light company for injuries sustained from contact with a defectively insulated wire of the defendant while climbing a telephone pole, it was held that the doctrine of assumption of risk did not apply; that, as to the defendant, it was a question of due care and reasonable inspection of wires known to be dangerous when out of repair; that, as to the plaintiff, it was a question of due care in doing his work in a situation which he knows necessarily involves some hazard.
2. SAME — CONTRIBUTORY NEGLIGENCE. — The fact that the plaintiff knew that one man had ascended the pole before him; that he looked and saw the proximity of the wire to the pole and testified that it seemed all right; that when opposite the wire he felt a sway of the pole and that was the last he remembered, did not render him guilty of contributory negligence as a matter of law.
3. SAME — INSTRUCTIONS. — Instructions as to contributory negligence were erroneous in that the jury were led to determine the degree of care required of the plaintiff according to his own situation and not with reference to what men of ordinary care and prudence would have done under the circumstances.

In Error to the Circuit Court of the United States for the District of Massachusetts.

John Lowell and *James A. Lowell,* for plaintiff in error.

William A. Pew, Jr., for defendant in error.

Before PUTNAM and LOWELL, Circuit Judges, and ALDRICH, District Judge.

Opinion by ALDRICH, District Judge:

At the time of the injury complained of the Gloucester Electric Company, the defendant below, maintained an electric lighting system in and about the city of Gloucester, and Joseph R. Dover, the plaintiff below, was an employee of the New England Telephone & Telegraph Company, which maintained a system of wires in the same locality.

At the place of injury on East Main street there were two poles, one belonging to the telephone company, and the other to the electric company, and the poles were eight or ten feet apart. The defendant's pole upon its arms and other appliances carried several insulated electric light wires, with a current of something like 2,555 volts. The telephone pole carried certain fire-alarm wires belonging to the city of Gloucester, and four bare iron wires and one cable of its own, and a second cable was being strung upon the telephone pole at the time of the injury. It was in connection with the stringing of this cable that the injury was sustained by the plaintiff. These poles are spoken of in the record as having a "street side," and a "field side," meaning, of course, that one side faces the street and the other the field. The wires upon the

for live wires; but there was no evidence that he actually knew that the insulation was broken on the wire in question at the time of the injury. Dover had been working on a near-by pole, and was ordered down to relieve a kink in the cable, and it became necessary in the prosecution of the work for him to ascend the pole in question to a point above the defendant's wire which caused the injury. One Gillis was on the pole above him at the time. Before starting, the plaintiff looked up the pole to see if everything was clear so he could get up. He saw the location of the wires, and, among other things, that one of the electric wires was within four or six inches of the pole he was to climb, and, on being asked about the insulation, he said it looked to be all right. Gillis, who ascended the pole before him, testified that he supposed that they were electric wires and kept away, that in going up the pole opposite the wire he saw the break in the insulation, and in coming down he saw where the wire had rubbed against the pole and burned it.

It is pointed out by one side that there was considerable evidence tending to show that this break in the insulation, and particularly the charred mark on the pole, could be seen from the middle of the street some feet away, while it was suggested by the other side that such a mark would more readily catch the eye of one standing some distance from the pole than of one who was standing at its base.

The defendant claims, first, that, though Dover was working for the telephone company, the liability of insulation of electric wires to get out of repair is so well understood, and the danger is so far within the knowledge of an experienced lineman, that it should be held that he assumed the risk or hazard incident to the defendant's wire being maintained in proximity to those of the telephone company, for which he was working.

We need not inquire whether the doctrine of assumption of risk, which, in its general acceptation, applies to cases between employer and employee, and involves the idea of implied contract of assumption, might, under some conditions, be extended to a case in which the injury results from a careless condition of things caused by the negligence of an outside party in respect to an outside business, because there is nothing in the nature of the plaintiff's contract with the telephone company, or in the character

of the work, so far as shown by the record, which would warrant the application of the doctrine of assumption of risk against the plaintiff and in favor of the defendant.

We think it a question of due care. So far as the defendant is concerned, it is a question of due care and reasonable circumspection in respect to the oversight of wires known to be dangerous when out of repair in a situation where it is the duty and the right of others to go in the prosecution of their work, and, so far as the plaintiff is concerned, a question of due care in the manner of doing a rightful work in the line of duty, in a situation which he knows necessarily involves some hazard. Knowledge that wires are liable to get out of repair, and when out of repair that they are dangerous to life, is something entering into the question of care as it applies to both parties.

The defendant's second position is that the plaintiff's case is controlled against him by contributory negligence, and that it was so unquestionably careless for a man who knew the liability of insulation to get out of repair, and the resulting danger, to merely look and then voluntarily bring himself into contact with a wire without the safeguard of a safety belt, that contributory negligence should be ruled as a matter of law.

We do not think the negligence so clear as to warrant this. The plaintiff knew that one man had acended the pole before him; and when he was called upon to ascend the pole and do something in the line of his work, he looked and saw the proximity of the wire to the pole which he was to ascend, and testified that it seemed all right. He may, without thinking much of insulation, have meant by this that he thought he could climb the pole without touching the wire, because he said he went up on the field side, sliding his hands up the pole, and that he felt a sway of the pole as though the men had given a jerk and let up quick, and that was the last he remembered. If it were clear that he had seen the break in the insulation, or that he had climbed the pole and got in contact with the wire, without any intervening cause like the swaying of the pole, it would be quite a different thing. There is no evidence that he saw the lack of insulation. It is only argued that he ought to have seen it. This being so, and the unforeseen swaying of the pole being the probable cause of the contact, it reasonably, we think, became a question for the jury

whether, under all the circumstances the plaintiff exercised the care of a prudent man in attempting to do what he did.

The defendant's third point is that, if the question of the plaintiff's care is one for the jury, it was not submitted under proper instructions, and upon this point we are compelled to hold with the defendant.

It is quite apparent, from the correct statement of the principle by the learned judge upon the motion to set aside the verdict, that he had in mind the rule under which questions of care in respect to a given situation are submitted to a jury; but we think he failed in his instructions to convey to the jury a full understanding of the rule which should have governed them in their deliberations in respect to the proper standard of care and in respect to its application to the plaintiff. The effect of the instructions, we think, was to lead the jury to determine the question of the plaintiff's due care by reference to men of the character of the plaintiff and with reference to his own situation and observation, rather than by reference to the standard afforded by the man of ordinary prudence. Thus the learned judge said:

"I think you should take, gentlemen, this particular pole and form a judgment. How suspicious a place was it? How dangerous a place would it appear to the ordinary observation of a man of this character? How suspicious would it appear to a man of that kind? Was he fairly warned by the mere look of that place that there was danger that the insulation might be off, or that he was called upon to inspect for lack of insulation? Is the lack of insulation — is a bare spot on the wire — a thing of such common occurrence, gentlemen, on poles of this description, that men should always invariably inspect it and always make a close inspection?"

The last words quoted, we think, led the jury to understand the real issue in the case to be, did due care require the plaintiff to make a "close inspection" of the pole? A misleading standard of due care was thus suggested, which, so far as appears by the record, was not sufficiently corrected by other instructions.

Under the instructions, we think the jury would naturally turn the case in their own minds upon the situation and the particular man in question, and upon the question whether such a situation always requires close inspection. We are unable to find anything in the instructions which would convey to the jury the idea that the plaintiff's care should be determined with reference to the question as to what men of ordinary care and prudence would

have done under the circumstances. The plaintiff's negligence, if there were negligence, would consist in the failure to use such care as a person of common prudence similarly situated would exercise. The question of ordinary caution in carrying on dangerous work, or the question of ordinary care and prudence, must be determined with reference to what men of ordinary prudence would do under the circumstances. Similarly situated and under like circumstances, of course, includes the idea of men of similar knowledge and experience; and ordinary care means such care as such men would ordinarily exercise in such a situation as the plaintiff was in.

The reason for this rule, quite likely, is found in the idea that greater security resides in an impersonal standard than in the best attempt of jurors to decide upon a particular personal aspect. In the one view, the jurors are bound to hold the plaintiff's rights subject to the standard of care which men of ordinary prudence would exercise, while in the other the jury would be relieved from that standard, and feel at liberty to say, "Well, he probably thought it was all right, or perhaps he did not think," or, "It cannot be reasonable that men should always and invariably make a close inspection." In the one aspect there is a standard; in the other there is no standard for measuring the care.

Of course, it stands to reason, under the rule of ordinary care, that the jury must consider the entire situation. The knowledge of the dangerous elements involved, the duty to enter the field of hazard, where the dangers cannot always be seen, where the care of a reasonable man may or may not discover the danger of contact if things remain as he sees them, and the probability that danger would have been averted but for the intervention of some unforeseen force which precipitates the danger, are all things to be considered. Care cannot be measured in degrees applicable to a particular plaintiff in a particular situation of hazard. Due care in a particular situation can only be ascertained upon inquiry as to what men of ordinary prudence would have done in a situation like that in which the plaintiff was involved. This idea was not clearly brought to the attention of the jury.

The judgment of the Circuit Court is reversed, and this case is remanded to that court, with directions to set aside the verdict and for further proceedings not inconsistent with this opinion; and the plaintiff in error recovers its cost of appeal.

VILLAGE OF PALESTINE v. SILER.

Illinois Supreme Court — Feb. 21, 1907.

225 Ill. 630, 80 N. E. 345.

1. NEGLIGENCE — LIABILITY OF VILLAGE OPERATING ELECTRIC LIGHTING PLANT. — A village maintaining an electric plant and furnishing light, both for public and private use, cannot be held liable for its negligent or wrongful acts, unless it appear that authority was conferred upon the village to furnish electric lights to private citizens.
2. SAME — CARE OF STREETS. — A village is bound to see that its public streets are not improperly used, encroached upon or rendered dangerous by electric lighting wires and poles, and it does not matter whether a municipal corporation, a private corporation or an individual owns the electric lighting plant.
3. DEATH FROM CONTACT WITH GUY WIRE CHARGED FROM ELECTRIC LIGHT WIRE — INSTRUCTIONS. — In an action against a village for death caused by coming in contact with a guy wire in a public street, an instruction that a person walking upon the public street of a village has a right to presume that anything placed thereon by the village authorities is harmless, unless its appearance shows it to be otherwise or unless he has notice of its dangerous character, was not erroneous and did not presuppose that a person walking on the public street has the right to turn aside and handle everything placed along and on the street by municipal authority, no matter for what purpose.
4. SAME — INSTRUCTIONS — CONTRIBUTORY NEGLIGENCE. — An instruction that if the jury believe, from a preponderance of the evidence, that the post to which the guy wire was attached was in the public street and within the easy reach of the decedent while upon the street, and that the deceased had no notice of its dangerous condition, the jury might consider such facts, together with all the other facts and circumstances in proof, in determining whether or not deceased was guilty of contributory negligence, when taken in connection with the other instructions was not misleading.
5. SAME — MODIFICATION OF INSTRUCTIONS. — It was not error to strike out the underscored words from an instruction to the effect that unless it appeared that the deceased, while in the exercise of due care and caution for his own personal safety, *necessarily and* unavoidably came in contact with a guy wire, the jury should find the defendant not guilty.
6. SAME. — Where an instruction was given to the effect, that if the deceased took hold of a wire charged with electricity, and thereby received the shock which resulted in his death, the plaintiff could not recover, it was proper for the court to modify it by inserting the words "knowing or

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Liability of Village Operating Electric Lighting Plant. — As to the liability of a municipality operating an electric lighting plant for negligence in its construction or maintenance, see *Davoust v. City of Alameda, ante*, and note thereunder.

Care in Use of Streets. — As to the use of streets by electric light companies, see *Allegheny County L. Co. v. Booth et al., ante*, and note thereunder.

having reason to believe the same to be charged," and "knowing or having reason to believe the said wire to be charged."

7. LIABILITY OF VILLAGE MAINTAINING ELECTRIC LIGHTING PLANT.—A village has no right to carelessly and negligently construct an electric lighting plant and then escape liability by casting the burden of notice of the dangerous character of electricity, machinery, etc., upon the injured person.

8. SAME—MODIFICATION OF INSTRUCTIONS.—An instruction that whoever voluntarily and unnecessarily interferes with or undertakes to handle any of the wires, apparatus, machinery or attachments of such electrical property of any such village or city (for an unlawful purpose) does so at his own peril, and, if he receives any injury thereby, he cannot recover damages from the city or village for the injury so received, was modified by adding the words in parenthesis and it was held that this was perhaps unnecessary, but was not prejudicial.

Appeal by defendant from a judgment for plaintiff. *Affirmed.*

Abe L. MacHatton, Callahan & Jones, and *Eagleton & Baker,* for appellant.

Bradbury & MacHatton and *Maxwell & Jones,* for appellee.

Opinion by WILKINS, J.:

The Circuit Court of Crawford county rendered a judgment in favor of appellee, against appellant, in an action on the case for $2,000 and costs for wrongfully causing the death of his intestate. On appeal to the Appellate Court for the Fourth District that judgment was affirmed.

The plaintiff's amended declaration consisted of three counts, to which the defendant demurred, but the demurrer was overruled, and by leave of court it filed a plea of the general issue and two special pleas. Plaintiff demurred to each of these, and the demurrer was overruled as to the first and sustained as to the second and third pleas. The case was then tried before a jury on the amended declaration and the plea of the general issue. It is not claimed that the declaration was so fatally defective that it would not have supported a verdict, and therefore no question as to its sufficiency can now be raised. By pleading over after its demurrer was overruled the village waived any demurrable defects therein. But it is earnestly contended by counsel for the defendant that the trial court erred in sustaining plaintiff's demurrer to its second and third special pleas. The several counts of the declaration charge that the defendant owned and operated a cer-

tain electric light plant within its corporate limits for the purpose of lighting the public streets, and for hire in supplying electric light to the citizens of the village. They then aver that in the operation of its plant it used certain poles and wires along its streets and alleys, and the first count proceeds:

"And it then and there became and was the duty of the defendant to keep its said wires properly insulated, located, and adjusted so that when the same were charged with electricity persons might pass along and upon and use said public streets without danger or injury therefrom, yet the defendant, not regarding its duty in this behalf, knowingly, carelessly and negligently permitted one of its said wires charged with electricity, as aforesaid, at or near the intersection of Wilson and Grand Prairie streets, in said village, to become and remain uninsulated, and, so uninsulated, to fall from its support on one of the defendant's poles to and upon a certain guy wire of the defendant extending from said electric light pole to a certain post of the defendant, and to within, to wit, four feet from the surface of the said street, and negligently, carelessly and knowingly permitted the same to so remain for a long space of time, to wit, five days, and by reason whereof said guy wire became and was then and there charged with electricity, and while the decedent was then and there passing along the sidewalk and street there, with all due care, caution, and diligence for his personal safety, his hand and body came in contact with said guy wire charged with electricity, as aforesaid, and a current of said electricity passed from said guy wire to, upon and through the body of the said decedant, and thereby he, the said decedent, was then and there instantly killed."

The second and third counts are not materially different in their averments of negligence from the first.

The first special plea avers that at the time of said alleged injury the defendant was, and now is, a municipal corporation, etc., authorized, under the police power of the State, to provide for lighting its public streets, and, pursuant to such authority, it was operating a certain electric light plant, with poles and wires on the public streets, and had then and there certain wires attached to a dynamo, which wires extended along certain poles then and there erected for the support of said wires, which said poles were then and there held in position by certain guy wires fastened to certain posts then and there set in the ground of the public streets of the defendant, and said electric wires were connected to certain lamps located along the streets, and said lamps were then and there lighted by the transmission along, through and upon said wires so connected with the said dynamo, of a current of electricity from said dynamo, "and the injury as complained of in said several counts of the declaration was occasioned while the defend-

ant was then and there lighting the lamps along said several streets of the defendant pursuant to the authority hereinbefore set forth." The second special plea avers that the defendant was a municipal corporation, etc., and as such "had no power or authority, under the laws of said State, either by direct enactment or as a necessary incident to such authority, to furnish electric lights, or electricity to make light for hire, to any citizen or resident of this defendant, and the injuries alleged in the several counts of the declaration to have been caused by carelessness or negligence on the part of this defendant while so furnishing such light was not within the authority of this defendant."

It is insisted in the argument, in support of the sufficiency of these pleas, that, inasmuch as the defendant was a municipal corporation exercising its police power for the lighting of the public streets of the village, it could not be held liable for an injury resulting from its negligence in the exercising of such power; that the case is within the rule announced by this and other courts as to the exercise of police power in creating a fire department and other departments for the benefit of all the public. And, as to the second special plea it is insisted that, inasmuch as the statute simply authorizes cities and villages in this State to provide for lighting their streets and other public places, the attempt of the village to furnish light to private citizens was beyond its power, and, therefore, under the two pleas, the doctrine of *respondant superior* has no application. In Dillon on Municipal Corporations, vol. 1, § 27, the rule in such cases is laid down as follows:

"A municipal corporation which supplies its inhabitants with gas or water does so in its capacity of a private corporation, and not in the exercise of its powers of local sovereignty. If this power is granted to a borough or city it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. In separating the two powers, public and private, regard must be had to the object of the Legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character; but if the grant was for purposes of private advantages and emoluments, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company. It stands upon the same footing as would any individual or body of persons upon whom the like special franchises had been conferred."

We have accordingly held that where a municipality acts in the dual capacity of furnishing water, gas or other commodity, both

for public and private use, under authority of law, it stands upon the same footing as would a private corporation or individual and is alike liable for its negligent or wrongful acts. *Wagner v. City of Rock Island,* 146 Ill. 154; *City of Chicago v. Schwab & Co.,* 202 Ill. 550, 67 N. E. 386. Other courts have held the same rule. Counsel for appellee seem to rely upon this doctrine, but if the rule that a corporation acting in its public capacity is not liable in such case is applicable to this case, the exception growing out of the fact that it also furnishes the commodity to private consumers could not be applied, for the reason that there is no authority conferred upon a city or village to act in the latter capacity. In other words, in order to bring the case within what may be termed an exception to the general rule, it must appear that authority was conferred upon the village to furnish electric lights to private citizens, and we find no such authority, either express or implied. It has been held, though never directly by this court, that "cities and villages have no power, under the statute, to furnish electric lights to the inhabitants nor to fix rates and collect for such services." *Village of Ladd v. Jones,* 61 Ill. App. 584.

We are, however, of the opinion that counsel for the defendant, by their first and second special pleas, misapprehended the gravamen of plaintiff's cause of action as set up in the several counts of the declaration. The wrong done to the plaintiff, as there alleged, was not merely in the negligent operation of the electric light plant, but the charge is, and the evidence proved, that the deceased came to his death by reason of the defendant's omission of duty in keeping its public streets and sidewalks free from obstructions and the deadly wires of its light plant. Clearly, the charge is not merely that the defendant negligently maintained and operated its electric light plant, but is that it suffered and permitted uninsulated wires to obstruct the public street so as to render it dangerous to persons passing along the same. The section of the statute conferring powers upon cities, villages, and towns (section 62, c. 24, Hurd's Rev. St. 1905), imposes the duty upon the municipal authorities to regulate the use of streets and "prevent and remove encroachments or obstructions upon the same." The declaration expressly charged the defendant with a violation of the duty of keeping its streets free from obstructions

and dangerous obstacles, and it was no answer to those allegations to say by the pleas that the defendant maintained the electric light plant in its public, municipal capacity. Whoever owned the plant, whether a municipal corporation, a private corporation or an individual, the village was bound to see that its public streets were not improperly used, encroached upon or rendered dangerous to people rightfully using the same. If the charge in the declaration had been that the deceased came to his death by coming in contact with electric wires improperly insulated or placed at other places than upon the public streets and highways of the village there could have been force in the position of counsel for defendant, but the pleas were no answer to the allegations of the several counts of the amended declaration, and the demurrer was therefore properly sustained to each of them.

Timely and proper motions were made to withdraw the case from the jury, upon the ground that the evidence did not fairly tend to support plaintiff's cause of action, which motions were overruled, and the defendant excepted. The facts proved upon the trial were not seriously controverted, though counsel reach different conclusions as to the effect of the evidence. It was shown an electric light was established at the intersection of cross streets in the village, one called Grand Prairie street, running north and south, and another Wilson street, running east and west. The light was suspended in the center of the intersection from two poles, each about twenty-five feet high and located on the southeast and northwest corners of the intersection. An in-

pole to which it was attached, on the south side of the walk. The deceased, a boy eighteen years of age, was employed in the store of one Deitz, and on the night of his death, about 11:30 o'clock, left the store with his employer, starting home. When the street running east and west from the intersection above mentioned was reached they turned west on the south side of the street, deceased being on the right-hand side of the walk. As they approached the intersection Deitz stopped, passed behind the deceased and started in a northwesterly direction across the street. When about half way across he saw a flash of light and heard a noise behind him. He immediately called to the boy, but, receiving no answer started back, when he discovered sparks emitting from the wire, and saw the hand of the deceased slip from the guy wire, and he immediately fell to the ground dead.

The evidence was somewhat conflicting as to how long the wire, with the insulator, had been dislodged from the pole. Some of the witnesses fixed the time at several days and others at a shorter period, but there can be no question but that it had been in that condition for a sufficient length of time to make it a question of fact for the jury whether or not the defendant was chargeable with constructive notice of the condition. Morever, the evidence fairly tended to show that actual knowledge of the condition was reported to the superintendent of the light plant before the accident. The facts proved upon the trial fairly tended to establish every material allegation of the declaration, and the court properly refused to instruct the jury to find the defendant not guilty. In determining the question of the care required at the hands of the defendant, the fact must not be ignored that the use of electricity for the production of light and power is attended with great danger, and the care required of those using it must be commensurate with the danger. The evidence produced before the jury furnished no basis for the contention that the deceased was guilty of contributory negligence.

The sixth and eighth instructions given on behalf of the plaintiff are objected to as misleading and erroneous. The sixth simply told the jury that a person walking upon the public street of a village has a right to presume that anything placed thereon by the village authorities is harmless, "unless its appearance shows it to be otherwise or unless he has notice of its dangerous character."

The criticism is that it presupposes that a person walking on the public street has the right to turn aside and handle and investigate any and everything placed along and on the street by the municipal authority, no matter for what purpose. We do not think the instruction is susceptible of such meaning, but that the express qualification that unless the object appears dangerous, or the person has notice of its dangerous character, rendered it a fair statement of the law as to the rights of persons using the public streets and walks of a village or city. The eighth instruction is to the effect that if the jury believe, from a preponderance of the evidence, that the post to which the guy wire was attached was in the public street and within the easy reach of the decedent while upon the street, and that the deceased had no notice of its dangerous condition, the jury might consider such facts, together with all the other facts and circumstances in proof, in determining whether or not deceased was guilty of contributory negligence. The objections to it are so general that we are unable to understand just what the error complained of is, but, when taken in connection with all the other instructions in the case, it cannot be said to be misleading. It will be observed that it does not direct a verdict upon the finding of certain facts, but simply authorizes the jury to consider those facts, with others, in passing upon the question of contributory negligence. It is again insisted that the court erred in modifying several of the instructions on behalf of the defendant. In all sixteen instructions were given at the instance of the defendant and two refused. If we are right in what we have said as to the liability of the village on the allegations of the declaration the two instructions were properly refused, and this counsel for appellant do not question.

The third instruction, as offered, was to the effect that unless it appeared that the deceased, while in the exercise of due care and caution for his own personal safety, *necessarily and* unavoidably came in contact with a guy wire, the jury should find the defendant not guilty. The court struck out the underscored words, and this modification it is claimed was error. We do not think so. The instruction as given stated the law as favorably to the defendant as it was entitled to.

The sixth instruction was to the effect that if deceased took hold of a wire charged with electricity, and thereby received the

shock which resulted in his death, the plaintiff could not recover, and the court modified it by inserting the words, "knowing or having reason to believe the same to be charged," and "knowing or having reason to believe the said wire to be charged." The modification was proper.

The seventh instruction was also modified. As offered by the defendant it read:

"In cities and villages where electricity is used for lighting or other purposes, all persons must take notice of the dangerous nature of the electricity and electrical machinery and govern themselves accordingly. (But it is the duty of the city or village to construct and maintain such plant in a safe condition.) Whoever voluntarily and unnecessarily interferes with or undertakes to handle any of the wires, apparatus, machinery or attachments of such electrical property of any such village or city (for an unlawful purpose) does so at his own peril, and, if he receives any injury thereby, he cannot recover damages from the city or village for the injury so received."

The court modified the instruction by adding the words in parenthesis, as above shown. The first modification was certainly proper under the facts of the case. The village had no right to carelessly and negligently construct an electric light plant and then escape liability by casting the burden of notice of the dangerous character of electricity, machinery, etc., upon the injured person. It was, as the court stated in the modification, its duty to construct and maintain its plant in a safe condition. The last qualification was perhaps unnecessary, but we do not see that it could have had any prejudicial effect upon the rights of the defendant.

Other instructions asked by the defendant were slightly modified, and, it is claimed, erroneously; but no substantial error is pointed out in that regard, and our examination of the modifications has led us to the conclusion that they did not materially change the meaning and effect of the instructions.

We are satisfied, after a careful consideration of each of the questions involved in this record, that the judgment of the trial court was right, and properly affirmed by the Appellate Court. Its judgment will accordingly be affirmed.

Judgment affirmed.

POSTAL TELEGRAPH CABLE CO. v. LIKES.

Illinois Supreme Court — Feb. 21, 1907.

225 Ill. 249, 80 N. E. 136.

1. INJURY TO TELEGRAPH LINEMAN FROM CONTACT WITH WIRES OF RAILWAY COMPANY — PROOF OF NEGLIGENCE. — In an action by a lineman of a telegraph company against his employer and a railway company for injuries received by coming in contact with a feed wire of the railway company while ascending a pole, it was alleged that the defendants failed to furnish plaintiff a safe place in which to work; that they failed to warn him of hidden dangers, and that they failed to insulate the feed wires, or otherwise protect and warn plaintiff of the danger of coming in contact with those wires. It was held that proof of facts from which the law would impose a duty upon appellant to furnish a safe place in which to work, or to warn plaintiff of hidden dangers incident to his work, or to insulate the feed wires, and proof of a violation of either of those duties, would be sufficient proof of negligence.
2. SAME — DUTY OF INSPECTION OF WIRES AND POLES — DUTY TO WARN LINEMAN OF DANGER. — Although the duty of inspection of wires and poles upon and around which a lineman is working may ordinarily be upon such lineman where his knowledge or previous experience is such that he may know and appreciate the danger to which he is exposed, yet where the master knows of peculiar and unusual dangers which a lineman will encounter in the performance of certain work, or has reason to anticipate the presence of such danger, and the danger is of such a nature that the servant, from lack of knowledge, may not appreciate or understand it, the master owes the servant the duty of warning him of such danger.
3. SAME — NOTICE TO REPRESENTATIVE OF DANGER IS NOTICE TO COMPANY. — Where a representative of a telegraph company directed and superintended the stringing of wires, his knowledge of their dangerous proximity to feed wires of a power company was the knowledge of the telegraph company.
4. SAME — ASSUMPTION OF RISK. — Danger from feed wires attached to a pole at a point below telegraph or telephone wires was not one of the ordinary risks assumed by a lineman engaged in stringing telegraph wires, where the wires appeared to be ordinary telephone or telegraph wires, and harmless, and their dangerous character could not be discovered by ordinary inspection.
5. SAME — PLEADING — PROOF. — In an action by a telegraph lineman against his employer and a railway company for injuries received by coming in contact with the feed wires of the railway company while stringing wires for his employer, the declaration alleged that by reason of the failure of the telegraph company to warn plaintiff, and while obeying the negligent order of the telegraph company's foreman he came in contact with

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Injuries to Employees of One Company by Contact with Defectively Insulated Wires of Another Company. — See *Economy L. & P. Co. v. Sheridan*, 8 Am. Electl. Cas. 795, and note thereunder.

the feed wires of the railway company and was injured. It was also alleged that the injury occurred by reason of the joint negligence of both defendants. *Held*, that it was not necessary to prove the allegation of joint negligence in order to hold the telegraph company liable.

6. SAME — EVIDENCE. — It was not error to exclude the admission of a city ordinance requiring the railway company to maintain guard wires above its electric wires at all points where wires of other companies were suspended above such electric wires, where the telegraph company did not promise to show that it relied upon the railway company complying with said ordinance.

Appeal by defendant from a judgment of the Appellate Court affirming a judgment in favor of plaintiff. *Affirmed.*

Statement of facts by SCOTT, C. J.:

This was an action of case, originally brought in the Circuit Court of Cook county on February 25, 1902, by William E. Likes, the appellee, against the Chicago and Milwaukee Electric Railway Company (hereinafter referred to as the "Railway Company") to recover damages for a personal injury sustained by Likes on November 4, 1901. On April 8, 1902, the Postal Telegraph Cable Company (hereinafter referred to as the "Postal Company") was joined as a defendant, and thereafter, on May 9, 1902, a declaration was filed against both defendants as joint tort feasors. Demurrers were interposed and sustained to this declaration and to two amended declarations subsequently filed. On October 2, 1903, the plaintiff filed a third amended declaration, to which the defendants interposed separate pleas of not guilty. A trial was had before a jury, and a verdict was returned finding both defendants guilty, and assessing the plaintiff's damages at $25,000. Both defendants moved for a new trial. The motion of each was denied. Appellant then made a motion in arrest of judgment, which was overruled, and on motion of the plaintiff judgment was rendered on the verdict against the Postal Company alone. The plaintiff thereupon dismissed the suit as to the Railway Company. The Postal Company appealed to the Appellate Court for the First District, and, that court having affirmed the judgment of the Circuit Court, a further appeal has been prosecuted by the Postal Company to this court.

The declaration filed on October 2, 1903, consisted of three counts. Each count alleged that on November 4, 1901, the Postal Company owned and operated lines of telegraph wires and poles in and through the county of Lake, in the State of Illinois, and the Railway Company owned and operated a line of electric railway in said county, together with wires and poles for the transmission of electricity used in operating its cars upon such railway. Each count also alleged that on said date the Postal Company was, with the knowledge and consent of the Railway Company, engaged in stringing and attaching certain wires to and upon a certain arm attached to a certain pole, which said arm and pole were owned by the Railway Company, and were situated on or near Waukegan avenue, near the guard house at Fort Sheridan, in Lake county, Ill. All of the counts alleged that attached to another arm on this pole were three uninsulated wires belonging to the Railway Company,

which wires were transmitting a dangerous current of electricity; that plai tiff was in the employ of the Postal Company as a lineman, and that whil ascending said pole, in the exercise of due care, for the purpose of stringi and attaching telegraph wires for his employer to the first above mentioe arm of said pole, he came in contact with the said wires of the Railw Company. The second and third counts allege that both defendants knew, might have known by the exercise of due care, that the three wires of t Railway Company were heavily charged with electricity, exposed, uninsulate and dangerous, but that such fact was unknown to the plaintiff. Neither th nor any similar allegation is contained in the first count. The negligen charged in the first count is that the defendants, and each of them, failed furnish plaintiff a safe place in which to do his work, and failed to wa plaintiff of hidden and unseen dangers incident to his work, whereby he ca in contact with the feed wires of the Railway Company, and that the defen ants, and each of them, failed to insulate the wires last aforesaid, or othe wise protect and warn plaintiff of the danger of coming in contact therewit The second count charged that the foreman of the Postal Company, who w in authority over plaintiff, carelessly and negligently ordered plaintiff ascend the pole for the purpose of stringing and attaching wires to the a of the pole, and that the Railway Company knew, or might have known, th said foreman would order plaintiff to ascend said pole for the purpose afo said, and that the defendants, and each of them, carelessly and negligent failed to insulate said wires of the Railway Company, or otherwise prote and warn plaintiff of the danger of coming in contact with them. The thi count charged negligence against the defendants in failing to have the po stenciled, or to have signs of danger on said arm or pole so as to warn plai tiff of the danger, and in failing to insulate the wires, or otherwise prote or warn plaintiff of the danger arising from those wires. Each count co tains an allegation that by and in consequence of the joint and concert ca less and negligent conduct of the defendants, as set forth in the count, t plaintiff was injured.

The evidence showed that on the morning of November 4, 1901, Likes, wi Johnson, Weaver, and Donnelly, in charge of a foreman named McLaughli all in the employ of the Postal Company, went from Chicago to Fort She

On and prior to the day Likes was injured the Railway Company owned and operated an electric railway, which ran north and south upon Waukegan avenue past Fort Sheridan. The cars were propelled by electricity transmitted over a trolley wire, which was suspended above the highway upon poles. The power house of the railway company was located two or three blocks south of the last-mentioned pole, and three feed wires, conveying electricity to be transmitted to the trolley wire at points further north, extended north from the power house, and were attached to poles on the east side of Waukegan avenue. These feed wires were the same in appearance and size as the copper wire ordinarily used for telegraph and telephone purposes. They were uninsulated, and were transmitting 5,500 volts of electricity, and would cause serious injury or death to any person coming in contact with them. They had been attached to an arm on pole No. 654 several feet below the top about four months after the erection of that pole. No sign or other mark showing the dangerous character of these wires was upon the pole on the day Likes was injured. The cross-arm to which the telephone wires were attached and to which appellant's wires were to be fastened was above the feed wires and near the top of the pole. Likes and Johnson were the only climbers among the men sent by appellant to Fort Sheridan on the morning of November 4, 1901. Weaver and Donnelly were there to uncoil the wire for the climbers, and McLaughlin was the foreman in charge of the work. Upon their arrival at Fort Sheridan McLaughlin told Likes and Johnson upon what poles they were to string the wires, and to which pins on the cross-arms the wires were to be fastened. The method used in stringing wires where there were two climbers, as in this case, was for the men to climb alternate poles. The plaintiff testified that McLaughlin gave the order to climb the poles in such a manner as to indicate that Likes was to ascend the first pole, Johnson the second pole, and Likes the third pole, being pole No. 654. McLaughlin directed Likes and Johnson to start with the most easterly of the three poles, being in the Fort Sheridan grounds, and gave the ends of the wires to Likes, who thereupon ascended that pole and placed the wires in position. McLaughlin remained with Weaver and Donnelly, while Likes and Johnson proceeded to the second pole. After Johnson had placed the wire upon the second pole and had descended to the ground, there was a short delay, caused by the wires becoming tangled in uncoiling. McLaughlin, who was assisting Weaver and Donnelly in straightening out the tangle, finally called to Likes and Johnson that it was all right and to "go ahead." Likes then took the ends of the two wires and started up pole No. 654. In ascending to the cross-arm on which the foreman had directed him to place the wires he was obliged to pass between the electric railway feed wires, and it was therefore necessary for him to reach out from the pole, in order to pass the wires which he was carrying outside and over the feed wires, and in doing so his arm came in contact with one or more of the feed wires, and he received the current of electricity into his arm and body. He fell backwards, freeing himself from the feed wires, and his belt caught on one of the iron steps of the pole, where he hung until he was taken down by his fellow workmen. He was seriously injured by being burned and shocked by the feed wire or wires with which he came in contact.

McLaughlin testified that he made no inspection of pole No. 654 nor the wires on it, that he paid no attention to what was on the pole before the acci-

dent, and that he did not tell Likes or Johnson anything about feed wires being upon the pole or in the highway. McLaughlin had been foreman for the Postal Company for fourteen years, and in 1901 had charge of all work connected with stringing wires and putting in offices within a radius of 100 miles from Chicago, which would include the place where this work was being done. He testified that he knew what a feed wire was, and that it was not insulated outside of a city; that he knew there were feed wires used in connection with the railway company's line, and knew there were high tension electric wires running along Waukegan avenue, and learned when Likes was injured that those wires were attached to pole No. 654. The evidence tends to show that, about a year before the accident to Likes, McLaughlin had been told of the death of a lineman caused by coming in contact with feed wires of the Railway Company four or five blocks south of the place where Likes was injured, and that he was then told that if he ever had any work to do up there he had better look out for those wires. Likes was thirty-five years old at the time he was injured, and had been working for appellant as a lineman for nearly three years. He had worked at Fort Sheridan on the Saturday preceding the accident, but not in the vicinity of the railway feed wires, and that was the only day, with the exception of the day on which he was injured, that he had ever worked at Fort Sheridan. He testified that he did not know that there were live wires running along there, and that he received no warning or notice of their presence; that there were no signs upon the poles indicating the dangerous character of the wires; that he had previously worked on poles upon which there were other wires besides telegraph wires, but had no previous experience with high tension wires; that he had frequently worked around electric light systems in Chicago, but that the wires in those systems were insulated. The evidence shows that it is the practice of those engaged in placing electric wires to string wires carrying dangerous currents of electricity above all other wires, and that when a lineman sees a wire fastened below telegraph or telephone wires it is an indication that such wire is not dangerous. It was also shown that all other poles to which these feed wires were attached contained a sign on which was printed a warning that the wires were dangerous.

Immediately after the plaintiff had rested his case, and again at the close

Waters & Johnson, Tinsman, Rankin & Neltnor, and *H. B. Sherman,* for appellee.

Opinion by SCOTT, C. J.:

It is first urged that the court erred in refusing to direct a verdict for appellant at the close of all the evidence. The reasons assigned in support of this contention are, first, that the evidence failed to establish the existence of any duty on the part of appellant charged by the declaration to have been violated; second, that the plaintiff assumed the risk of injury from the feed wires; and, third, that there was a fatal variance between the declaration and the proof as to the ownership of the pole and as to the charge of joint negliegnce.

In regard to the first of these reasons, there are several distinct breaches of duty alleged in each count. The first count charges that the defendants failed to furnish plaintiff a safe place in which to work; that they failed to warn him of hidden dangers, and that they failed to insulate the feed wires, or otherwise protect and warn plaintiff of the danger of coming in contact with those wires. Proof of facts from which the law would impose a duty upon appellant to furnish a safe place in which to work, or to warn plaintiff of hidden dangers incident to his work, or to insulate the feed wires, and proof of a violation of either of those duties, would be sufficient proof of negligence on the part of appellant under this count. In actions *ex delicto* it is not necessary that the plaintiff prove all the material allegations of his declaration. If he prove enough of the material allegations to make out a cause of action he is entitled to recover, even though there are other averments of the declaration which are not proved. *Louisville, New Albany & Chicago Railway Co. v. Shires,* 108 Ill. 617; *City of Rock Island v. Cuinely,* 126 Ind. 408, 18 N. E. 753.

The second count is in the same condition as the first, in that it contains more than one charge of negligence. It counts upon a negligent order by appellant's foreman and upon a failure to insulate the feed wires. In the view we take of this case, it will only be necessary to consider the first count in the light that it charges a duty upon appellant to warn plaintiff of hidden dangers, and the second count in so far as it alleges that the foreman gave plaintiff a negligent order.

We deem it apparent from the evidence, the substance of which

is contained in the statement of facts preceding this opinion, that appellant's foreman, McLaughlin, had far more reason than had Likes to anticipate the presence of feed wires upon the pole in question. Had Likes known that uninsulated feed wires were being used by the Railway Company in connection with its railway along Waukegan avenue, and that these wires had caused the death of a lineman at a place on the same avenue only a few blocks south, on account of being in close proximity to other wires, it is reasonable to believe that he would have avoided contact with these wires, even though he did not certainly know that they were charged with a dangerous current of electricity. His testimony, however, shows that he had never worked in the vicinity of Fort Sheridan except on the Saturday preceding the injury, and then not near the highway, and was not familiar with this pole or its surroundings, and that he did not know of the presence of feed wires along the highway; that all high tension wires around which he had previously worked had been insulated; that these feed wires had the appearance of ordinary telegraph or telephone wires, and the evidence shows that their location on the pole at a point below the arm carrying telephone wires would indicate to a lineman that they were either telegraph or telephone wires and harmless. Although the duty of inspection of wires and poles upon and around which a lineman is working may ordinarily be upon such lineman where his knowledge or previous experience is such that he may know and appreciate the danger to which he is exposed, yet where the master knows of peculiar and unusual dangers which a lineman will encounter in the performance of certain work, or has reason to anticipate the presence of such danger, and the danger is of such a nature that the servant, from lack of knowledge, may not appreciate or understand it, the master owes the servant the duty of warning him of such danger. 4 Thompson's Commentaries on the Law of Negligence, § 4118. The master's duty in each case must necessarily depend upon the ability of the servant to recognize and appreciate the danger which he will encounter in the performance of his work, and the master cannot act upon the assumption that the servant, being a man of average intelligence, will recognize and appreciate latent and hidden dangers which cannot be discovered by ordinary inspection, and of which the servant has no knowledge.

McLaughlin, in directing and superintneding the stringing of these wires, was the representative of appellant, and his knowledge was the knowledge of appellant. *Consolidated Coal Co. v. Wombacher,* 134 Ill. 57, 24 N. E. 627. Appellant therefore knew that the wires were to be placed upon poles upon and around which the plaintiff's employment had not before that time required him to work, and that the plaintiff was therefore necessarily ignorant of any peculiar or unusual danger which might be encountered in ascending the pole. It knew that the Railway Company was using uninsulated feed wires in connection with its railway along Waukegan avenue, and that those wires, at a point on the highway a few blocks south of the place where plaintiff would be required to work, had been placed in such close proximity to other wires as to cause the death of a lineman working on such other wires. Its knowledge was such that by the exercise of reasonable care for the safety of its servants it might have known of the dangerous character of the feed wires upon the pole, and in such case the law will impute and infer notice to it of their presence and dangerous character. *Consolidated Coal Co. v. Haenni,* 146 Ill. 614, 35 N. E. 461. But the plaintiff's knowledge and previous experience were not such that he might know or appreciate the danger to which he was then exposed. Under these circumstances, we cannot say that the evidence did not tend to establish the existence of a duty on the part of appellant to warn plaintiff of the danger arising from the presence of the feed wires upon the pole. We are also of the opinion that there was evidence from which the jury might find that appellant, through its foreman, was negligent in ordering the plaintiff to ascend the pole without informing him of the danger to which he might be exposed.

The cases cited by appellant holding that the duty of inspection rests with the servant, and that the master is therefore under no duty to warn the servant, are cases where the injured servant had an equal opportunity with, or better opportunity than, the master of knowing and appreciating the danger to which he was exposed, and the danger was such as might have been discovered by the servant, with the knowledge shown to have been possessed by him, by ordinary inspection. Those cases are in these respects distinguishable from the one at bar.

It is next urged that the plaintiff assumed the risk of the danger from which he was injured. A servant only assumes the ordinary risks incident to his employment and such dangers as are obvious and apparent. Danger from feed wires attached to a pole at a point below telegraph or telephone wires was shown not to be one of the ordinary risks incident to plaintiff's employment. In their position below the telephone wires they constituted an unusual risk, which was not incident to the employment of a lineman engaged in stringing telegraph wires. Neither was the danger obvious or apparent. The wires appeared to be ordinary telephone or telegraph wires, and harmless, and their dangerous character could not be discovered by ordinary inspection.

The last reason urged in support of the contention that the court should have directed a verdict for appellant is that there was a fatal variance, in that each count alleged that the pole on which plaintiff was injured was owned by the Railway Company, that appellant was engaged in stringing and attaching its wires to an arm on that pole with the knowledge and consent of the Railway Company, and that the injury occurred by reason of the joint and concert negligence of the two defendants; while the evidence showed that the Railway Company was not the owner of the pole, and did not know that appellant was engaged in stringing wires thereon, and no joint and concert negligence was established against the defendants.

The evidence tended to establish a cause of action against the Postal Company under each of the first and second counts of the declaration without proof of either of the allegations mentioned in the foregoing paragraph. So far as that company was concerned, the evidence tended to show it guilty of negligence charged by the narr., no matter to whom the pole belonged, and without regard to whether the negligence of another company contributed to the injury, or whether such other company knew that it was engaged in stringing wires upon the pole in question. These allegations not being essential to the cause of action against appellant, it was therefore unnecessary to prove them, and it was immaterial if the evidence disproved them. *Louisville, New Albany & Chicago Railway Co. v. Shires, supra; City of Rock Island v. Cuinely, supra; Swift & Co. v. Ruthowski,* 182 Ill. 18, 54 N. E. 1038. The declaration alleged the presence of apparently harmless unin-

sulated wires upon a pole, which it became necessary, in the performance of his duties as a lineman in the employ of appellant, or in obedience to an order of his foreman, for the plaintiff to ascend, and that while in the performance of such duties or in obedience to such order he was ascending the pole with due care, he came in contact with the apparently harmless uninsulated wire, and was injured. Proof of these allegations, together with proof that appellant knew or could have known by exercising ordinary care, of the existence of these wires and their dangerous character, and that the plaintiff was ignorant of such existence and character, and did not have equal opportunity with appellant to ascertain the same, was sufficient to establish a duty on the part of appellant to warn plaintiff of the danger, and to refrain from ordering him to ascend the pole without such warning, and proof of a violation of either of these duties established a cause of action against appellant, unless it appeared that the plaintiff assumed the risk which caused his injury.

It is said, however, that, as there was no allegation in the first count that appellant knew or ought to have known of the danger, the allegations in regard to the ownership of the pole and the consent of the Railway Company to the placing of wires thereon by the Postal Company were essential to show a cause of action against appellant, as they were the only allegations from which it could be inferred that appellant had, or ought to have had, knowledge of the danger from the feed wires. This count was defective in failing to allege knowledge by appellant, but we do not think the allegations under discussion were intended to or did supply this defect. They were evidently intended to constitute a part of the case stated against the Railway Company. The count, notwithstanding the defect, however, was sufficient, after verdict, to support a judgment against the Postal Company. *Sargent v. Baublis,* 215 Ill. 428, 74 N. E. 455.

It is also contended that the allegation that the injury occurred by reason of the joint and concert negligence of both defendants was necessary to be proved, because it was the only allegation showing any connection between the injury to the plaintiff and the negligence of appellant. The first count of the declaration alleged that by reason of the failure of appellant to warn plaintiff he came in contact with the feed wires, and the second

count alleged that while he was obeying the negligent order of appellant's foreman he came in contact with those wires, and it appeared from each count that the injury was occasioned by such contact with the feed wires. It therefore appeared from averments of the counts, other than those charging that the negligence was occasioned by reason of the joint and concert negligence of both defendants, that the plaintiff was injured through appellant's negligence in failing to warn him of the danger and in giving him a negligent order.

We are of the opinion that none of the reasons urged by appellant would have justified the court in giving the peremptory instruction offered by appellant at the close of all the evidence.

The Railway Company offered no witnesses on the trial of this cause. It is urged that the court erred in permitting such company to cross-examine the witnesses introduced by appellant, and to argue to the jury facts brought out by these witnesses after it had announced its intention, at the close of the plaintiff's evidence, to abide by its motion for a peremptory instruction, which had been refused by the court. There was no error in this action of the court. The railway company, by its conduct in this regard, merely waived its right to have only the evidence introduced by the plaintiff considered as against it, and authorized the court and jury, in determining whether a case had been established against it, to take into consideration the evidence introduced by the Postal Company, as well as that introduced by the plaintiff. In *Condon v. Schoenfeld,* 214 Ill. 226, 73 N. E. 333, relied upon by appellant, the defendant, who introduced no evidence, did not participate in the further trial of the cause, and therefore, did not waive his motion for a peremptory instruction, and it was there held that the evidence introduced by his codefendant could not be considered in determining whether a case had been made out against him.

It is next contended that the court erred in entering judgment against appellant alone upon a declaration charging joint negligence and upon a verdict finding joint liability. This question has been heretofore decided by this court adversely to appellant's contention. In *Davis v. Taylor,* 41 Ill. 405, it was held that taking a judgment against a portion of the defendants amounts to a dismissal of the case as to the residue, and that in actions

ex delicto this may be done because there is no contribution among wrongdoers, and that if the mode of doing it is irregular, it is an irregularity which works no prejudice to those defendants against whom the judgment is taken. Under the authority of the case last cited the action of the plaintiff in moving for judgment against the Postal Company alone, and the action of the court in entering judgment against that company, amounted to a dismissal of the case as to the Railway Company, and if there was any irregularity in the proceedings in this regard it is one of which appellant cannot complain. It was also held in *Illinois Central Railroad Co. v. Foulks,* 191 Ill. 57, 60 N. E. 890, that where the jury has returned a verdict against several defendants in an action *ex delicto* the plaintiff may dismiss his suit as to a portion, and take judgment upon the verdict against the remainder of the defendants.

By an amendment to his amended declaration the plaintiff alleged that on account of the injuries received by him he was rendered impotent for the rest of his natural life. He testified that he was in perfect health up to the time he was injured. On his direct examination he was asked by his counsel, "Now, Mr. Likes, how have you been with reference to your virility since the accident?" to which he replied, "Almost entirely gone." The evidence shows that the plaintiff's nervous system was very seriously impaired by reason of the injuries received by him; that he has temporary periods of insanity, and has suicidal and homicidal tendencies, and that it will eventually be necessary to confine him in an asylum for the insane. We think that the evidence tended to show that all of the plaintiff's disorders, including loss or impairment of virility, were the result of the injuries received by him on November 4, 1901. There was therefore no error in the action of the court in refusing to strike out the testimony of Likes that his virility was almost entirely gone, or in refusing to give to the jury appellant's twenty-second instruction, which would have told the jury to disregard this testimony.

The plaintiff testified, over the objection of appellant, that he was married, and that one child had been born of this marriage. It is urged that this evidence was introduced solely for the purpose of arousing the sympathy of the jury and increasing the amount of the verdict. For such purpose it was, of course, im-

proper; but the plaintiff's attorney stated, when offering this evidence, that it was only introduced for the purpose of showing that the plaintiff had virility before he was injured, and such evidence tended to establish that fact. By instruction numbered 18, given at the request of appellant, the court told the jury that if they found one or both defendants guilty, in assessing plaintiff's damages they must not take into consideration the question whether or not the plaintiff has a wife or family who may be dependent upon him for support. We think this instruction limited the consideration of this evidence by the jury to the purpose for which it was offered, and that appellant was not injured by its admission in this case.

The plaintiff was also asked if his child was still living, and answered that it was dead. No objection was made to this question, and no motion was made to strike out the answer. Appellant, therefore, did not preserve its right to urge a reversal on account of the admission of this testimony.

Appellant offered in evidence an ordinance of the village of Fort Sheridan requiring the railway company to maintain guard wires above its electric wires at all points where wires of other companies were suspended above such electric wires. The court refused to admit this ordinance in evidence, and appellant contends that this constitutes reversible error. This offer was not accompanied by any promise to show that the appellant relied upon the railway company complying with this municipal regulation. The mere existence of the ordinance could not be regarded by the jury as justification for the order alleged to be negligent or for the failure to warn the plaintiff. The court did not err in excluding this proof.

The attorney for the Railway Company, at the request of the plaintiff's attorney, made certain admissions as to facts in order to obviate proof of such facts. Appellant contends that the matters so admitted to be true were untrue, and that it was injured thereby. At the time these admissions were made appellant's attorney stated that they were not to be taken as admissions by his client, and at the request of appellant the court instructed the jury that these admissions were not evidence against the Postal Company, and should not be taken into consideration in determining whether a case had been established against such

company. Appellant thus obtained all the relief to which it was entitled on account of the admissions of its codefendants, and we think that the allegel facts so admitted were not material to the plaintiff's cause of action against appellant.

Appellant offered a number of instructions announcing the rule as to who are fellow servants, and advising the jury that if the injury to Likes was ocassioned by the negligence of a fellow servant he could not recover. All of these instructions were refused, and it is contended that the court erred in thus refusing to submit to the jury the question whether Likes was injured through the negligence of a fellow servant. In support of this contention it is urged that the evidence tended to show that at the time plaintiff was ascending the pole he was delayed, hindered, and embarrassed by a lack of slack in the wire which he was carrying, and that this condition was caused by a tangle of the wire, which was being unreeled, jerked, and pulled by McLaughlin, Weaver, and Donnelly, and that the jury could have found from the evidence that the three persons last mentioned were guilty of negligence in this regard, that such negligence was purely that of a fellow servant, and that such negligence caused the injuries to the plaintiff, and that the instructions were intended to advise the jury that if the injury was brought about by reason of any negligence of McLaughlin, Weaver, and Donnelly in this regard the plaintiff could not recover. No count of the declaration charged any negligence in reference to a tangle or lack of slack in the wire, and the jury were expressly instructed that there could be no recovery unless it was shown, by a preponderance of the evidence, that the plaintiff was injured as a result of the negligence charged in the declaration. The instructions stating the fellow-servant doctrine were properly refused. There was no issue in the case to which they were applicable.

The court gave an instruction, upon its own motion, which appellant contends disregarded the defense of assumed risk. The instruction told the jury that the plaintiff had brought his suit upon the theory that he was injured by the joint and concert negligence of the defendants, and it was the function of the jury to determine whether, under the evidence and instructions of the court, the plaintiff had established a case against both of the defendants, or either of them or neither of them, and that if the

evidence, under the instructions, warranted it, the jury might find one defendant guilty and the other not guilty, or might find both guilty or both not guilty. The evident purpose of this instruction was to announce the law in reference to a recovery against one of two defendants in an action for a tort where the declaration charged that both defendants were guilty of negligence and the proof established the guilt of but one. The instruction is not one which enumerates the elements necessary to be proved in order that the plaintiff may recover, but expressly refers the jury to the evidence and the instructions of the court in determining whether the plaintiff has established a case against either or both of the defendants or neither of them. The instructions so referred to include instructions submitted by appellant which fully informed the jury as to the defense of assumed risk. There was, therefore, no error in giving the instruction under consideration.

Appellant complains of the action of the court in refusing its instruction numbered 27. This instruction was upon the assumption of risk by the plaintiff. Seven instructions were given to the jury at the request of appellant stating the law applicable to this defense, and the twenty-seventh instruction was fully covered by those given.

Appellant's instruction numbered 23 was properly refused because it was included in its instruction numbered 3 which was given.

The record in this case is free from substantial error, and the judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

CARTWRIGHT, HAND, and CARTER, JJ. (*dissenting*). To admit evidence that the only child of the plaintiff, who claimed to have lost his procreative powers, had died, so that he must remain childless through the fault of the defendant, was serious and prejudicial error, and we think the objection made to that class of testimony preserved the question for review.

There was evidence tending to prove that the injury resulted from the negligence of fellow servants of the plaintiff in handling the wire, and we think the defendant was entitled to an instruction advising the jury as to the law on that subject, and that the

error in refusing such instructions was not obviated by referring the jury to the declaration to determine the nature of the negligence charged.

CITIZENS' TELEPHONE CO. v. WESTCOTT'S ADM'X.

Kentucky Court of Appeals — Feb. 21, 1907.

124 Ky. 684, 99 S. W. 1153.

1. DEATH FROM CONTACT WITH TELEPHONE BOX, CHARGED BY ELECTRIC LIGHT WIRE — CONTRIBUTORY NEGLIGENCE. — Where it appeared that decedent knew of the dangerous condition of a telephone box, that its wires crossed an electric light wire, that he touched it with his fingers and with a wire causing sparks, and that he placed his hand upon the box and received a shock resulting in instant death, the court should have sustained a motion for a peremptory instruction in favor of the telephone company.
2. SAME. — Where one knows of a dangerous condition, although it is brought about by the negligence of another, he cannot idly or wantonly experiment with it at the risk of that other.

Appeal by defendant from a judgment for plaintiff. *Reversed.*

Thos. P. Carothers, for appellant.

Greene & Van Winkle, Thos. L. Michie, and *Phillip Ryan,* for appellee.

Opinion by BARKER, J.:

This is an action instituted by Alice Westcott, as administratrix of Edward Westcott, deceased, to recover damages for the death of the deceased, who was her husband, from the effect of an electric shock received by him on August 21, 1905. The appellant, the Citizens' Telephone Company, and the Union Light, Heat & Power Company, both corporations doing business in Newport, Ky., were made defendants, and charged in the petition with having, by gross negligence, caused the death of Edward Westcott. Both defendants filed answers, controverting all the material allegations of the petition, and pleading contributory negligence on the part of the decedent. These affirmative allegations of the answer were controverted by reply, and the issues thus completed. A trial resulted in a verdict against the Citi-

zens' Telephone Company for $15,000, and in favor of the Union Light, Heat & Power Company. From the judgment based upon this verdict this appeal is prosecuted.

The substantial facts are as follows: At the time of his death Edward Westcott was in the employ of the Chesapeake & Ohio Railway Company and the Louisville & Nashville Railroad Company as night gate operator, and was engaged at his business in the watch tower at the railroad crossing on Monmouth street, between Eleventh and Twelfth streets, in Newport, Ky. In the watch tower there was what is called in the record "a block signal telephone box," which is a part of a line of railroad telephone used by the above-mentioned railroad companies for their private business, but which is owned and operated by the Citizens' Telephone Company. The telephone line had sagged down on John street until it rested upon the highly charged electric wire of the Union Light, Heat & Power Company, and had by this contact become itself dangerously charged with electricity, which it conveyed to the telephone box station in the watch tower. As soon as the dangerous current reached the telephone box it burned out the fuse and manifested itself by a buzzing sound and emitting sparks. This unusual condition of affairs attracted the attention of Westcott, who said to John Shaw, the telegraph operator, who was with him in the tower, that "the thing had a fit;" and he thereupon began a series of experiments, by placing his finger lightly against the box and withdrawing it quickly so as to make the sparks fly from the highly charged box. He also obtained a short piece of insulated wire, and, holding it by the insulated part, he placed the uninsulated ends to the box, making it emit a shower of sparks. This was begun in the early part of the evening, about dusk, and was continued at various times from then until about 2 o'clock, when he was killed. Early in the evening, the witnesses say about dusk, two young men, who saw that the telephone line was crossed with an electric wire on John street, came to the tower and informed the inmates, of whom Westcott was one, of the fact that the wires were crossed, and that the condition resulting therefrom was dangerous. Two policemen, who came into the watch tower during the night, before the accident, saw Westcott experimenting or playing with the charged box. Afterwards, as said before, he placed his hand

upon the box in such manner as to receive a shock that caused his hand to involuntarily grip the box, and at the same time he was hurled to the floor, tearing the box from its fastenings on the wall, and killing him almost instantly.

Assuming for the purposes of this appeal that the crossing of the telephone with the electric wire was negligence on the part of the appellant company, is appellee, under the state of facts detailed above, entitled to recover damages for his death? The decedent was thirty-four years of age, and, so far as this record shows, was a man of at least ordinary intelligence, and his business indicates that he understood something of machinery and the simplier laws of natural physics. It is perfectly plain, from the uncontradicted testimony, that he was at the time of his death not engaged in any duty connected with the telephone box from which he received the fatal shock, but, on the contrary, knowing the abnormal condition with which he was confronted, he was, for his own amusement, experimenting with it as above indicated. The manner in which he made these experiments shows clearly that he appreciated the occult danger connected with his operations; and, in addition, he had been informed early in the evening that the cause of the box being charged was that the telephone line was crossed with the electric wire, and that this condition was dangerous. John Shaw, the night operator, testified without contradiction that Westcott was present when John Scott and Irwin Zitt brought in the information that the lines were crossed on John street, and the dangerous condition resulting therefrom.

The question, then, arises: If all the evidence touching the cause of Edward Westcott's death shows without any sort of contradiction that he knew the dangerous condition of the telephone box, and so knowing, without any duty calling him thereto, he deliberately placed his hand on the highly charged instrument, and received a shock which resulted in his death, can his personal representative recover damages? We think this question must be answered in the negative. In the case of *City of Owensboro v. York's Adm'r*, 77 S. W. 1130, 25 Ky. Law Rep. 1397, which was a case in some respects similar to the one under consideration, except that the decedent was an infant, the rule on the question in hand is thus stated:

"It is earnestly insisted for the city that there can be no recovery, although it was negligent in having the hot wire in the street, for the reason that the intestate knew the danger and voluntarily took the risk, assuming that, if he stood on the board, the electrical current would not hurt him. This would be true of an adult, but the question is whether the same rule should be applied to an infant twelve years old."

The courts have gone a long way in saying that the highest possible care should be used by those who manufacture and sell electricity, because the electric current being invisible and silent is difficult to discover and guard against in advance of its fatal effects; and, while perhaps this reasoning cannot be applied strictly to a telephone company, which is not engaged in carrying electricity for sale or distribution, but only carries a current, not at all dangerous to human life, for its own purposes, we do not deem it necessary to stop here to draw or point out the distinction between it and the electric light and power companies proper. The rule is so well established that it needs no citation of authority to support it that where one knows of a dangerous condition, although it is brought about by the negligence of another, he cannot idly or wantonly experiment with it at the risk of that other.

The sum total of plaintiff's evidence, so far as appellant is concerned, is that the decedent was killed by coming in contact with one of its boxes which had become charged with electricity by the crossing of its wire with an electric light wire. The defendant, without contradiction, showed all the facts we have detailed above with reference to the decedent's knowledge of the dangerous condition of the telephone box, and the manner of his being killed by wantonly experimenting with a known danger. It seems to us clear that the court should have sustained the motion for a peremptory instruction, made at the close of all the testimony, to the jury to find a verdict in favor of appellant.

The judgment is reversed for proceedings consistent herewith.

BRUNELLE v. LOWELL ELECTRIC LIGHT CORP.

Massachusetts Supreme Judicial Court — Feb. 28, 1907.

194 Mass. 407, 80 N. E. 466.

1. SHOCK FROM CORD OF INCANDESCENT LIGHT — WIRING BUILDING IN VIOLATION OF CITY ORDINANCE. — Where there was evidence that plaintiff in wiring his cellar for a portable light, violated a city ordinance in that he failed to notify the inspector of wires of the intended extension, and did not obtain a permit for such extension, and did not comply with the rules and regulations of the national board of fire underwriters, he cannot recover from the electric lighting company for injuries received if his violation of the ordinance contributed to the accident.
2. SAME — EVIDENCE — PRACTICE OF INSPECTOR OF WIRES. — It was error to receive the testimony of the inspector of wires that where wires were already installed and there was simply an extension made, it was not his practice to require an application to be made and a written permit obtained before the current was turned on, but to make such requirement only where there was a new installation.
3. SAME — OPINION OF INSPECTOR OF WIRES — CONSTRUCTION OF ORDINANCE. — The testimony of an inspector of wires to his opinion that it was not the duty of any person other than himself to enforce the provisions of the city ordinance, ought not to have been received. It was for the court and not for the witness to construe the ordinance.

Exceptions by defendant from verdict rendered in favor of plaintiff. *Sustained.*

Action for damages to the person. Plaintiff kept an apothecary store in Lowell, and defendant was a corporation having an electric light plant in that city furnishing electricity for light, heat, and power.

Plaintiff occupied a store on the southerly side of East Merrimack street, having on the ground a general room, and below in the cellar a room where medicines were stored and where it was frequently necessary to go in carrying on the business. Plaintiff had used electricity in his store on the ground floor, for lighting, since 1893, the inside wiring being installed by an electrical contractor, and all the wires and other electrical paraphernalia inside of the store, except the fuses, fuse box, and meter, were the property of the plaintiff. Defendants over their primary and secondary wires brought the electricity to the wall of plaintiff's store and there delivered it through a meter onto the wires within the store. On May 10, 1902, plaintiff employed one Hinckley, an electrical contractor, to make an extension of his wiring, pursuant to

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Injuries from Incandescent Light. — See *Peters v. Lynchburg, etc., Light Co., post,* and note thereunder.

Violation of City Ordinance. — As to when the violation of a city ordinance regulating the wiring of buildings constitutes negligence, see *San Antonio Gas & Electric Co. v. Badders et al., post.*

which contract Hinckley attached a wire to the inside wiring belonging to plaintiff, the connection being made near a door leading into the cellar, and this wiring was then carried into the cellar on the casing of the door and on the beams underneath, and was extended in the form of a portable or flexible stranded covered wire cord about fifteen feet long. To this was attached a lamp socket for an incandescent light. The end of the cord when not in use was kept suspended over a hook. There was no fuse in the rosette, nor on any part of the extension thus made, nor any fuse between this extension and the wiring inside of the store, to which the extension was attached. No notice was ever given to defendant of plaintiff's intention to make the extension, nor any permission of the city wire inspector asked before making it, but plaintiff testified that after the extension was made he went to defendant's office and told the clerk about it, requested a bulb, and thereafter that a man came from defendant light company and put on the glass bulb. On the evening of October 3, plaintiff went to the cellar and before going down turned on the switch which lighted the cellar lamp. He took hold of the flexible cord in such a manner that a part of the cord and a part of the lamp socket were in his hand, and in taking the light from the support he received a shock of electricity which threw him down, rendered him insensible, and inflicted severe injuries upon him. His hand was subsequently found to be severely burned and several fingers were subsequently amputated.

The ordinance of the city of Lowell referred to in the opinion provided (sections 9, 10, 11, and 14), as follows:

"Sec. 9. In no case shall a current of electricity be connected to any system of wiring or apparatus intended to be used for power or lighting without permission being first obtained and a written permit granted by the inspector of wires. The jurisdiction of the inspector is intended to include all public and private electrical systems that are now and may hereafter be installed in the city of Lowell. * * *

"Sec. 10. No person or corporation shall change the position or make additions to any wiring system or install any new work or electrical apparatus without first notifying the inspector and he given full opportunity to inspect the same before such work is completed, and when any electric wires designed to carry an electric current or power current are to be concealed the inspector must be notified before work is commenced, and he shall give his permission and approval for all such work and connections immediately unless in his judgment such apparatus or wiring endangers life or property or is not in accordance with the laws and ordinances or in conformity with the established insurance rules.

"Sec. 11. The inspector shall require that the established rules and regulations of the National Board of Fire Underwriters shall be complied with both for outside and interior construction."

"Sec. 14. Whoever violates or fails to comply with any of the provisions of this ordinance after being duly notified in writing by the inspector shall forfeit and pay for each offense not less than ten nor more than twenty dollars."

John J. & Wm. A. Hogan, for plaintiff.

William H. Bent, for defendant.

Opinion by SHELDON, J.:

In our opinion, upon the special findings made by the jury, the plaintiff would be entitled to retain his verdict if there was no error in the admission of evidence or in the instructions upon which those findings were made. But we are of opinion that there was such error.

There was, to say the least, evidence upon which the jury might have found that the plaintiff, in putting into his cellar the wire and appliances for a portable light, violated sections 9, 10, and 11 of the ordinances of the city of Lowell, in that he failed to notify the inspector of wires of the intended extension before the work was begun and did not obtain a permit for such extension, and did not comply, in making the extension, with the rules and regulations of the national board of fire underwriters; and that this conduct of the plaintiff was the cause of the accident which happened. In view of the penalty imposed by section 14 of the ordinance, the presiding justice rightly ruled that the plaintiff could not recover if he had thus acted in violation of the ordinance and such violation had contributed to the accident. *Brunelle v. Lowell Electric Light Corporation,* 9 Am. Electl. Cas. 494, 188 Mass. 493, 74 N. E. 676. But as bearing upon the latter question he permitted the inspector of wires, against the exception of the defendant, to testify that in a case like this, where wires were already installed and there was simply an extension made; it was not his practice to require an application to be made and a written permit obtained before the current was turned on, but to make such requirement only where there was a new installation; that in the majority of cases where the work was exposed, he did not go to examine the premises, but relied on his notice; that if he thought there was any question about the contractor or the premises he would make it his business to get there; that he knew Hinckley, the contractor who did this work, and that he stood well in his business. He further testified at considerable length to the same effect. That this evidence was introduced to excuse the plaintiff for not having seasonably made application and secured a permit from the inspector is shown by the fact that the judge in his charge called the attention of the jury to the testimony, and instructed them that in determining whether the plaintiff was negligent in not having *obtained a permit, they* might consider the practice of the in-

spector at that time not to grant permits, if they so found; and also allowed them, in passing upon the question whether the plaintiff's violation of the ordinance contributed to the happening of the accident, to consider whether the inspector, if he had received the proper notice, would have inspected these wires, fuses and apparatus, and have required them to conform to the standard of the rules and regulations of the national board of fire underwriters. In our opinion this was erroneous, and was prejudicial to the defendant; for the special findings of the jury may have rested entirely upon this testimony of the inspector of wires.

The usage and practice which the inspector testified that he had adopted were certainly contrary to the terms of the ordinance, and were unlawful. The jury should not have been allowed to speculate upon the question whether the inspector, if he had received proper notice from the plaintiff, would have neglected to perform his duty. This was wholly an immaterial question. *Jones v. Holden,* 182 Mass. 384, 65 N. E. 808; *Pickering v. Weld,* 159 Mass. 522, 34 N. E. 1081; *Abbott v. North Andover,* 145 Mass. 484, 14 N. E. 754; *Commonwealth v. Perry,* 139 Mass. 198, 29 N. E. 656; *Cutler v. Howe,* 122 Mass. 541. The recognized principle that in dealing with ancient instruments and transactions, where doubtful words are used, where the purpose and intent are obscurely expressed, the acts and conduct of the parties, immediately following, are to be regarded as the best expositors of the meaning intended. *Cambridge v. Lexington,* 17 Pick. 222, 230, is inapplicable here. And see, further, *Geyser-Marion Gold Mining Co. v. Stark,* 106 Fed. 558, 45 C. C. A. 467, 53 L. R. A. 684; *Consolidated Coal & Mining Co. v. Floyd* (Ohio), 38 N. E. 610, 25 L. R. A. 848.

The testimony of the inspector of wires to his opinion that it was not the duty of any person other than himself to enforce in the city of Lowell the provisions of the ordinance which has been mentioned, ought not to have been received. It was for the court and not for the witness to construe the ordinance. As the other questions raised upon the bill of exceptions are not likely to be presented in the same form at another trial, we do not deem it necessary to consider them in detail. We have not found any errors beyond those stated which would appear to be sufficient to warrant us in setting aside the verdict.

Exceptions sustained.

SULLIVAN v. BROOKLYN HEIGHTS RAILROAD COMPANY.

New York Appellate Division, Second Department — March 1, 1907.

117 App. Div. 784, 102 N. Y. Supp. 982.

ELECTRIC RAILWAYS — INJURY BY STEPPING UPON ELECTRICALLY CHARGED RAIL — INSTRUCTIONS. — In an action against a street railway to recover damages for injuries sustained by stepping upon an electrically charged rail, when the defendant has given expert testimony that the shock could not be received except under certain conditions that did not exist, it is error for the court to instruct the jury that if the plaintiff received the shock he is entitled to recover, whether the defendant has exonerated itself or not. Such instructions are equivalent to holding that the defendant was an insurer, and that the sole question was whether the accident resulted from the shock.

Appeal by the defendant from a judgment of the County Court of Queens county in favor of the plaintiff and from an order denying the defendant's motion for a new trial. *Reversed.*

Before JENKS, HOOKER, GAYNOR, RICH, *and* MILLER, JJ.

J. R. Oeland, for appellant.

Herbert N. Warbasse, for respondent.

Opinion by JENKS, J.:

The learned court submitted the case to the jury, and instructed it that the issue was whether or not the plaintiff received an electrical shock by stepping upon the rail. "If he did receive an electrical shock by stepping upon the rails of this track, and was injured in that manner, he is entitled to recover." At the close of the charge the learned counsel for the respondent said:

"I ask your honor to instruct the jury that if they believe the plaintiff received an electrical shock at the time alleged and in the manner described by the plaintiff, unless they are satisfied that the defendant has exonerated itself, they may bring in a verdict for the plaintiff upon that evidence."

The court replied:

"Whether the defendant has exonerated itself or not, if they believe he received an electrical shock, he is entitled to recover."

Injuries from Electrically Charged Rail. — As to injuries to laborers from contact with electrically charged rails, see *Keeley v. Boston Elevated Ry. Co., ante,* and note thereunder.

Exception was taken. The learned counsel for the appellant then excepted to that part of the charge wherein the court said that:

"If the plaintiff received an electrical shock when he stepped on the tracks, he is entitled to recover."

The court then said:

"I will modify that to the extent that, if he was injured by an electrical shock which he received by stepping upon the tracks, he is entitled to recover."

The defendant then excepted to the charge as given and to the modification. I think that the exceptions were well taken. The action was for negligence; that is, for a breach of the legal duty to use the care due under the circumstances. The defendant offered evidence, described by the learned court in its charge, "to the conditions of the track there, and the opinions of their experts as to the impossibility of an electrical shock being transmitted, except under certain conditions which must have been present, and which they claim were not present." And yet the court charged, "whether the defendant has exonerated itself or not," if the jury believed that the plaintiff received the shock he is entitled to recover, or, in other words, that the defendant was an insurer, and that the sole question was whether the accident had resulted from the shock. It had not ruled as matter of law that there was no evidence that exonerated or tended to exonerate the defendant, and then but left to the jury as questions of fact the happening of the accident from the cause alleged, and of the damages, but had submitted the entire case, charging as the law that, even if the testimony did exonerate the defendant, it was liable. It is quite true that the doctrine of "*res ipsa loquitur*" was applicable. *Clarke v. Nassau Electric R. R. Co.*, 6 Am. Electl. Cas. 234, 9 App. Div. 51, 41 N. Y. Supp. 78. But as we said in that case, per WILLARD BARTLETT, J.:

"The doctrine of *res ipsa loquitur* simply calls upon the defendant, after proof of the accident, to give such evidence as will exonerate him, if any there be, and relieves the plaintiff from the burden of proving the nonexistence of an adequate explanation or excuse."

See, too, *Ludwig v. Metropolitan St. R. Co.*, 174 N. Y. 546, 67 N. E. 1084.

The learned counsel for the appellant insists that in any event

the error was cured or waived in that thereafter the defendant requested the court to charge, and the court in effect charged:

"That the plaintiff has got to prove by satisfactory evidence that any injury he received was due to an electrical shock, * * * and that the jury have no right to theorize or speculate, and that the evidence must be positive evidence, and not probable or theorizing evidence."

These instructions related to the cause of the injury and the requisite proof thereof, and in no way affected the question which I have discussed.

I advise that a new trial be ordered; costs to abide the event. All concur.

BRUCKER v. GAINESBORO TELEPHONE CO.

Kentucky Court of Appeals — March 14, 1907.

125 Ky. 92, 100 S. W. 240.

1. ELECTRICITY — VOLTAGE — DUTY OF THOSE HANDLING. — Those handling electricity where the voltage is such as to endanger human life must exercise a very high degree of care for the safety of others, but where a less voltage is used which is not of itself dangerous those who use it are only liable for ordinary care.
2. SAME. — A telephone company inviting the public to use its instruments is not an insurer, but must use such care as may reasonably be expected of a person of ordinary prudence under the circumstances.
3. SHOCK FROM TELEPHONE — EVIDENCE. — In an action for injuries sustained from a shock received in grasping the metal arm of the receiver in defendants' telephone booth, evidence of the injury of another person from another phone, at another time and in the same city, was properly rejected.

Appeal by plaintiff from a judgment for defendant. *Affirmed.*

E. P. Morrow and *W. B. Morrow,* for appellant.

James Denton, for appellee.

Opinion by HOBSON, J.:

The Gainesboro Telephone Company operates a telephone system in Somerset, Ky., and maintains a pay station at the New-

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Duty of Telephone Companies to Patrons. — See *Delahunt v. United Telephone & Telegraph Co., ante,* and note thereunder.

tonian Hotel. Frank J. Brucker, while a guest at the hotel, was using the pay station to talk to his wife in Louisville. The phone did not seem to work well, and he took hold of the metal arm with his hand to raise the mouthpiece. When he did this, he received a severe shock of electricity which knocked him to the floor, rendering him unconscious and injuring his nerves. He suffered from the shock for about a month, and brought this action to recover against the telephone company for his injury. The proof for him on the trial was only of the fact above stated. That for the telephone company was to the effect that the instrument was examined by one of its men in ten minutes after the accident and was found to be all right. It had not been out of order before, and the cause of the accident is entirely unexplained. There was no storm at the time, although a high wind was blowing. An electric light was burning in the booth, and the electric light company had its wires in the hotel and throughout the town. These carried 2,200 volts of electricity. The voltage of the telephone system was seventy-five and was not sufficient to hurt any one. No one was in the booth at the time the accident occurred, but Brucker, or knew anything of the trouble until he fell to the floor. The plaintiff asked the court to instruct the jury that it was the defendant's duty to so maintain its wires and appliances at its pay station as to protect from danger those who used them, and that, if it failed to do this and Brucker was injured by reason of the appliances not being free from danger, they should find for him. The court refused to so instruct the jury, and instructed them that they should find for the plaintiff if they believed from the evidence that the defendant carelessly or negligently failed to so protect its wires and appliances, etc. The The jury found for the defendant, and the plaintiff appeals.

Those handling electricity where the voltage is such as to endanger human life must exercise a very high degree of care for the safety of others, but where a less voltage is used which is not of itself dangerous those who use it are only liable for ordinary care. *Triple State Gas Company v. Wellman,* 114 Ky. 79, 70 S. W. 49; *Mangan's Adm'r v. Louisville Electric Light Company,* 9 Am. Elect. Cas. 692, 91 S. W. 703, 29 Ky. Law Rep. 38. A telephone company is a common carrier of messages, and not of persons. The duty it owes to a customer using one of its

instruments is not different from that due to their customers by other persons inviting the public upon their premises for the transaction of business. In all such cases the person so inviting the public is not an insurer, but must use such care as may be reasonably expected of a person of ordinary prudence under the circumstances. In 1 Thompson on Negligence, § 970, the rule is thus stated:

"In these cases — if we except the case of passenger elevators in buildings, separately considered — the law is reasonable, and does not demand of an owner of property more than the exercise of ordinary care with respect to the rights of third persons; but, on the other hand, it does demand the exercise of due, reasonable, or ordinary care."

The plaintiff offered to show by a witness that a short time prior to his injury the witness, in using another phone in the city, received a severe shock of electricity. This evidence was properly rejected. The condition of another phone at another time was purely a collateral matter. The question the jury were to try was whether the defendant had exercised ordinary care with the phone at which he was injured. It is a matter of common knowledge that wires sometimes get crossed, and the fact that another phone was on another occasion out of order would have thrown no light on the case at bar.

Judgment affirmed.

DENVER CONSOLIDATED ELECTRIC CO. v. WALTERS.

Colorado Supreme Court — April 1, 1907.

39 Colo. 301, 89 Pac. 815.

1. INJURY TO CHILD FROM ELECTRIC LIGHT WIRES ENTERING DWELLINGS — INSTRUCTIONS. — Where in an action against an electric light company for injuries to a child from contact with defendants' wires, while looking out of a window, the complaint alleged negligence of the defendant in failing to keep the wires properly insulated, it was error to instruct the jury that the defendant was liable if the wires were not in a proper place.
2. SAME — EVIDENCE. — Where in an action against an electric lighting company for injuries sustained, it was simply alleged that defendant was negligent in maintaining its wires, evidence as to the location of the wires and converter was material and proper to be considered by the jury in determining the degree of care to be exercised by the defendant in maintaining and preserving the wires in question.

3. SAME — DEGREE OF CARE. — The same degree of care should be exercised by an electric light company to protect from injury the inmates of a house to which it is furnishing light as that which it is obliged to use to safeguard the traveling public from its overhanging wires in the highways.
4. SAME. — An electric light company is not an insurer of the safety of its customers.
5. EVIDENCE — OPINION OF EXPERT. — In an action against an electric lighting company for injuries sustained by coming in contact with an improperly insulated wire, it was proper to ask one of defendants' experts whether or not, in his opinion, at the time of the injury, the wire was properly insulated.
6. SAME. — Evidence by the defendant that there was not known to the arts or commerce a perfect method of insulation was proper, where the defendant had already brought out in evidence that it had used the safest known method.
7. CONTRIBUTORY NEGLIGENCE — INSTRUCTIONS. — In an action against an electric lighting company for injuries sustained by contact with an improperly insulated wire, the court instructed the jury that if the plaintiff was of a degree of intelligence at the time of the accident to know of the dangerous qualities of electricity, still, unless he knew or had some notice or reason to believe to the contrary, he is entitled to assume that the company had performed its whole duty in the matter of insulating its wires, and that the same were in safe and proper condition, and to act upon this assumption. *Held*, that the court should have added the statement that plaintiff could not recover unless he exercised a proper degree of care to avoid the danger, notwithstanding the assumption that defendant had done its duty.
8. SAME — QUESTION FOR JURY. — Evidence considered, and *held* that the question of plaintiff's contributory negligence was properly submitted to the jury.
9. ACCESSIBILITY OF ELECTRICAL APPLIANCES TO CHILDREN — DEGREE OF CARE. — It is not a mere possibility, but a reasonable probability, of accessibility of electrical appliances, used in connecting electric wires to a building, to and by children, that involves the strict rule that an electric company must exercise the highest degree of care.

Appeal by defendant from a judgment for plaintiff. *Reversed.*

Wolcott, Vaile & Waterman (*Wm. W. Field,* of counsel), for appellant.

E. T. Wells, J. H. Chiles, and *R. T. McNeal, for appellee.*

Opinion by CAMPBELL, J.:

In this complaint the plaintiff charges the defendant company with negligence which occasioned him personal injury, for which he asks compensation in damages. The answer of the defendant denies that it was negligent, and by an affirmative defense alleges

that plaintiff's injuries, if any, were brought about solely as the result of his own negligent act. The trial to the jury upon these issues resulted in a verdict for the plaintiff, and judgment went accordingly, from which the defendant appealed, and has assigned many errors of which the material and substantial ones are considered. This was the third trial of the action. Upon the first trial the action was dismissed by the District Court upon the ground that the complaint did not state a good cause of action. Upon appeal to the Court of Appeals, this judgment was reversed; the court, by THOMSON, P. J., holding that the complaint was good. *Walters v. Electric Light Co.,* 7 Am. Electl. Cas. 515, 12 Colo. App. 145, 54 Pac. 960. Upon the second trial, the jury returned a verdict for the defendant, and judgment entered thereon was reversed by the Court of Appeals because of erroneous instructions. *Walters v. D. C. E. L. Co.,* 8 Am. Electl. Cas. 555, 17 Colo. App. 192, 68 Pac. 117.

1. The first proposition advanced by appellee which we consider is that on the present appeal the decisions of the Court of Appeals in the cases mentioned constitute the law of the case. This point is conclusively settled against appellee by previous decisions of this court. *Brown v. Tourtelotte,* 24 Colo. 204, 50 Pac. 195; *Davidson v. La Plata Co.,* 26 Colo. 549, 59 Pac. 46; *City of Pueblo v. Shutt Inv. Co.,* 28 Colo. 524, 67 Pac. 162, 89 Am. St. Rep. 221. The point, however, is not important here, because the law, as laid down by the Court of Appeals, meets with our approval.

2. In view of instruction No. 7 given by the court, it is important with particularity to state that part of the complaint charging the negligence of the defendant and the antecedent matters of description or inducement. After allegations that defendant corporation was maintaining and operating an electric light plant in the city of Denver for conveying and supplying electric light to dwelling houses and other building therein, and that it had connected its wires with the dwelling house of plaintiff's father, with whom plaintiff, a minor twelve years of age, was then living and that such connection was for the purpose of supplying light to the house, and defendant had attached to the house, directly under one of the windows, an electrical device called a "converter," and had set and placed certain iron supports to

receive and hold glass insulators upon which were attached wires connecting with the house and conveying thereto the electric current for furnishing light, the complaint proceeds to charge that, whereas, it was the duty of defendant to cause the wires to be sufficiently and securely covered and insulated, and at all times so to keep and maintain them, the defendant, on the contrary, so negligently managed and conducted the wires that the covering thereon became weak and broken and out of repair, so that the wires were not covered or insulated, the result of which was that the current of electricity borne thereupon would and did pass therefrom; that on the day in question the plaintiff, who was an inmate of his father's house, while looking out of the window of the bath room, and seeing that one of the glass insulators had by some means fallen, or been removed, from the iron support where it was wont to rest, and not knowing the dangerous condition of the wire, or that any electric current could or might pass therefrom, and not realizing that the attempt to replace the insulator was attended with any danger to him, seized hold of the insulator in order to place it upon the iron support, and to the wire which was so attached, being naked and bare near to the insulator, the covering thereof being broken, plaintiff's hands and fingers were drawn by the electric current borne by the naked wire, or accidentally and without plaintiff's fault placed thereon by him, and "thereby, and solely by means of the negligence and want of due skill and care of the defendant in and about maintaining and caring for the said wire and preserving the same insulated and safe as aforesaid, the electrical current borne upon the said wire passed to and into the hand and body of plaintiff, and by the force thereof," etc., the injuries were sustained.

The seventh instruction is as follows:

"It is the duty of every corporation which undertakes to supply the electric current to a dwelling to exercise a high degree of care in order to prevent injury to those inhabiting the dwelling, and particularly children by coming in contact with their wires and other appliances, and such care must be exercised both in protecting such wires and appliances against contact and in the selection of the locality where the same are placed, and if the defendant company failed to exercise this degree of diligence in either respect and by reason thereof the plaintiffs, or either of them, received injury without fault on their part, the defendant is liable."

The paragraph, in effect, told the jury that plaintiff's cause of action was grounded upon two acts of negligence — one in select-

ing an improper place on the wall of the house for placing its wires and converter; the other in failing properly to keep them safe after they were placed there — and that, if the defendant failed in either respect to exercise the proper degree of diligence, it was liable if injury thereby was caused plaintiff without fault on his part. This instruction is fundamentally wrong, and the error in giving it is accentuated, since, in its third instruction, the court had fully defined what defendant's duty was, concerning the only charge of negligence specified, in maintaining its accessible wires. When at the trial plaintiff offered evidence concerning the location of the wires and electrical appliances, the defendant objected to the same upon the ground that the charge of negligence in the complaint was not in their location, but only in neglect in the maintenance of wires. The trial court, however, overruled the objection because, as the transcript shows, according to its motion, the Court of Appeals had ruled such evidence of location admissible generally. An examination of the opinion of GUNTER, J., in that case discloses that such evidence was held to be proper under the issues, but for one purpose, and one only, and the District Court in holding the evidence admissible as relevant to a supposed issue of negligence in location clearly misapprehended the effect of the opinion.

The Court of Appeals, in considering two of the instructions of the District Court upon the second trial, held that there was error therein, for the reason that the jury thereby were told that they could not consider the location of the converter, or transformer, in determining the degree of care that should be exercised in preserving the wire in question properly insulated. Judge GUNTER had already said, as had Judge THOMSON upon the first review, that the gist of the charge of plaintiff was that the defendant, through negligence, permitted the wire in question to be in an uninsulated condition, and he held that such location was a material factor to be considered by the jury in determining the degree of care which the defendant should bestow by proper inspection and otherwise in maintaining the wire in a reasonably safe condition, adding:

"If located at a point readily accessible, the law would require greater care of defendant to preserve the wire insulated than if the wire was located at an inaccessible point."

It thus clearly appears that, according to the ruling of the Court of Appeals, which we approve, the location of the wires and converter, though not set up by plaintiff as a substantive or separate charge or cause of action, was, nevertheless, material and proper to be considered by the jury in determining the degree of care to be exercised by the defendant in preserving and maintaining the wire in question in a safe and suitable condition, failure to do which was the only substantive cause of negligence relied on.

Although the trial court was right in overruling the defendant's objection to the admission of evidence as to the location of the electrical appliances for the reason just given, yet at the time of its admission the court should have admonished the jury that it was not admissible to establish any substantive act of negligence alleged in the complaint, but solely for the purpose of enabling them to measure the degree of care which the defendant is required to exercise in maintaining the wires in a properly insulated condition, and later on in its formal instruction should have advised the jury as to the limited purpose for which they could consider it. The plaintiff does not deny that this instruction tells the jury that they may hold the defendant if it has been guilty of negligence in the location of the electrical appliances, but says that the court should read the complaint as if such negligence was charged. It is true that, where a complaint avers negligence in general terms, it is good as against a general demurrer; but, where the plaintiff himself specifies a particular act or acts of negligence, he is confined in his proofs to them alone. A careful examination of this complaint satisfies us that its allegations with reference to the location of the converter and the wires were merely for the purpose of setting forth the situation, and by way of inducement only, and there was no intention to charge, and there was no charge, that the defendant was guilty of negligence in such location. Indeed, the complaint plainly and specifically says that the injury was inflicted "solely by means of the negligence and want of due skill and care of the defendant in and about maintaining and caring for the said wire and preserving the same insulated and safe, as aforesaid."

Plaintiff's argument that the judgment should not be set aside because the complaint was not properly amended to correspond to the evidence, by the insertion of allegations of negligence in the

location of the electrical appliances, has no merit, because the defendant specifically objected to its admission upon the ground that the complaint did not contain such charge, and there was no request at any time by the plaintiff thus to amend his complaint. The proof was, as we have said, properly received, but should have been restricted, by proper caution, at the time of its admission, and also later in the instructions to the one purpose for which only it was legitimate.

We have tried to sustain this instruction for a reason not suggested in the record, but upon mature consideration we are unable to do so. It has been ruled by this and other courts that where a numbered instruction contains one or more entirely independent propositions of law, and the objection thereto is general, if one or more of the distinct propositions are good, and others bad, the latter will not be considered under the general objection. Here the objection was to the instruction as a whole, but it contains but a single proposition of law stating the degree of care which the defendant is bound to exercise in either of two particulars, and the care is the same in both cases. In this connection it should be said that defendant specifically requested the court to charge that plaintiff had not alleged in his complaint, and could not rely on, negligence of defendant in location of its appliances, but the court refused to do so.

The plaintiff strenuously argues that since there have been three trials of the action, it would be a hardship to reverse the judgment because of error in the giving of this instruction. We appreciate fully the force of the argument, but are reluctantly constrained to say that it does not and ought not to control us. We cannot overlook this flagrant error. In view of the previous trials and the decision of the Court of Appeals upon both reviews that the only charge of negligence was failure in insulation, this error ought not to have been committed by the court. If counsel saw or read the instruction before its delivery, they might have called the court's attention to the mistake, or, if given without their previous knowledge, a request for its withdrawal or modification could have been made. Without arbitrarily disregarding repeated decisions of this and other courts and ignoring the constitutional rights of the parties to an impartial trial, we cannot close our eyes to the manifest harm which this instruction neces-

sarily caused defendant. For this reason alone, we would have reverse the judgment.

3. Were it not for this grave error, some other rulings, at le questionable, and complained of by defendant, might not, of the selves, in view of the peculiar state of this record, require reversal. In view, however, of another trial, we ought to expr our views concerning them to prevent a repetition of rulings whi if made at another time, might again cause a reversal of the ju ment, if in plaintiff's favor. It is fitting also to allude to s other questions of which defendant complains, which we shall are not subject to its criticism. Defendant, in the first of numerous briefs, was insistent that the doctrine, as to the deg of care required in the kind of business defendant was carryi on, first announced by this court in *Denver Electric Co. v. Sim son,* 5 Am. Electl. Cas. 278, 21 Colo. 371, 41 Pac. 499, 31 L. A. 566, is not applicable to the facts of the present case. In th case, wherein was defined the duty of an electric light company the traveling public, it was said that the degree of care was "t highest degree of care which skill and foresight can attain co sistent with the practical conduct of its business under the kno methods and the present state of the particular art." In *Den Electric Co. v. Lawrence,* 8 Am. Electl. Cas. 617, 31 Colo. 3 73 Pac. 39, the same doctrine was again announced, where t plaintiff was a member of a family occupying a dwelling ho to which the defendant was furnishing light. Defendant st insists that, though the *Lawrence Case* is squarely against its co tention, the decision is wrong, yet admits that, unless the questi is reconsidered and the doctrine changed or modified, the ruli of the trial court as to this feature will be sustained, for it mer follows the earlier cases. The doctrine is again affirmed. We no reason why the same degree of care should not be exercised an electric light company to protect from injury the inmates o house to which it is furnishing light as that which it is oblig to use to safeguard the traveling public from its overhanging wi in the highways.

4. Defendant objected to the nonobservance by the trial co in instructing the jury of the admonition which this court in *Simpson Case* said should be given, namely, that the jury sho be told that the defendant was bound to exercise that reasona

ing an improper place on the wall of the house for placing its wires and converter; the other in failing properly to keep them safe after they were placed there — and that, if the defendant failed in either respect to exercise the proper degree of diligence, it was liable if injury thereby was caused plaintiff without fault on his part. This instruction is fundamentally wrong, and the error in giving it is accentuated, since, in its third instruction, the court had fully defined what defendant's duty was, concerning the only charge of negligence specified, in maintaining its accessible wires. When at the trial plaintiff offered evidence concerning the location of the wires and electrical appliances, the defendant objected to the same upon the ground that the charge of negligence in the complaint was not in their location, but only in neglect in the maintenance of wires. The trial court, however, overruled the objection because, as the transcript shows, according to its motion, the Court of Appeals had ruled such evidence of location admissible generally. An examination of the opinion of GUNTER, J., in that case discloses that such evidence was held to be proper under the issues, but for one purpose, and one only, and the District Court in holding the evidence admissible as relevant to a supposed issue of negligence in location clearly misapprehended the effect of the opinion.

The Court of Appeals, in considering two of the instructions of the District Court upon the second trial, held that there was error therein, for the reason that the jury thereby were told that they could not consider the location of the converter, or transformer, in determining the degree of care that should be exercised in preserving the wire in question properly insulated. Judge GUNTER had already said, as had Judge THOMSON upon the first review, that the gist of the charge of plaintiff was that the defendant, through negligence, permitted the wire in question to be in an uninsulated condition, and he held that such location was a material factor to be considered by the jury in determining the degree of care which the defendant should bestow by proper inspection and otherwise in maintaining the wire in a reasonably safe condition, adding:

"If located at a point readily accessible, the law would require greater care of defendant to preserve the wire insulated than if the wire was located at an inaccessible point."

or commercially in use any insulation that was perfectly or absolutely safe under the conditions, and in the circumstances, described by plaintiff in his testimony and by defendant's witnesses. The court sustained an objection thereto, and this ruling is assigned as error. Defendant had already produced evidence that the insulation of this wire was that which was ordinarily used for exterior wiring. Plaintiff seeks to uphold this ruling upon the ground that the evidence offered was immaterial. In what respect immaterial, learned counsel do not say. The only ground that occurs to us upon which this ruling could be upheld is that, since the negligence averred in the complaint consists, not in improper insulation in the first instance, but failure to keep the wire properly insulated, it is immaterial what kind of insulation was first used, because the highest degree of care in selecting the best known insulating tape would not relieve the defendant of a similar degree of care in thereafter keeping its wires properly insulated through inspection, repair, etc. But from another standpoint its rejection was harmful. As plaintiff himself argues, the jury were, in legal effect, told that, while the defendant's duty was the exercise of ordinary care only, yet, considering the business which it was carrying on, and in the light of the facts of the case, the law steps in and says that ordinary care in such a case is "the highest degree of care which skill and foresight can attain consistent with the practical conduct of its business under the known methods and the present state of the particular art." Now, there was no direct evidence as to the actual condition of this wire before plaintiff grasped, or his hand came in contact with, it, and, in the absence of the evidence rejected, only by inference from conflicting evidence produced by the respective parties concerning its subsequent condition could the jury say what such former condition was.

The defendant was not an insurer, and the jury were instructed that no presumption of defendant's negligence arose from the accident. Defendant therefore was not liable, unless the evidence showed that it had omitted some necessary precaution in keeping its wire insulated. Surely, evidence that there was not known to the arts or commerce a perfect method of insulation, coupled with the fact, which defendant had already brought out in evidence, that it had used the safest known, was germane, and would help the jury in determining the previous condition of the wire; for while

location of the electrical appliances, has no merit, because the defendant specifically objected to its admission upon the ground that the complaint did not contain such charge, and there was no request at any time by the plaintiff thus to amend his complaint. The proof was, as we have said, properly received, but should have been restricted, by proper caution, at the time of its admission, and also later in the instructions to the one purpose for which only it was legitimate.

We have tried to sustain this instruction for a reason not suggested in the record, but upon mature consideration we are unable to do so. It has been ruled by this and other courts that where a numbered instruction contains one or more entirely independent propositions of law, and the objection thereto is general, if one or more of the distinct propositions are good, and others bad, the latter will not be considered under the general objection. Here the objection was to the instruction as a whole, but it contains but a single proposition of law stating the degree of care which the defendant is bound to exercise in either of two particulars, and the care is the same in both cases. In this connection it should be said that defendant specifically requested the court to charge that plaintiff had not alleged in his complaint, and could not rely on, negligence of defendant in location of its appliances, but the court refused to do so.

The plaintiff strenuously argues that since there have been three trials of the action, it would be a hardship to reverse the judgment because of error in the giving of this instruction. We appreciate fully the force of the argument, but are reluctantly constrained to say that it does not and ought not to control us. We cannot overlook this flagrant error. In view of the previous trials and the decision of the Court of Appeals upon both reviews that the only charge of negligence was failure in insulation, this error ought not to have been committed by the court. If counsel saw or read the instruction before its delivery, they might have called the court's attention to the mistake, or, if given without their previous knowledge, a request for its withdrawal or modification could have been made. Without arbitrarily disregarding repeated decisions of this and other courts and ignoring the constitutional rights of the parties to an impartial trial, we cannot close our eyes to the manifest harm which this instruction neces-

a proper degree of care to avoid the danger, notwithstanding the assumption that defendant had done its duty.

9. We think the court did right in submitting to the jury the question of the alleged contributory negligence of the plaintiff. From the evidence it cannot be said, as a matter of law, that the plaintiff was, or was not, negligent in what he did. We have already considered a similar question in the case of *Daniels v. Johnston* (at this term), 89 Pac. 811, and there held, as we hold now, that under the evidence the question was one of fact for the jury under proper instructions. The jury was advised in this case that plaintiff could not recover if he was guilty of contributory negligence, and that was a question of fact for them to determine in the circumstances of the case, including the age, experience, knowledge, and capacity of plaintiff to apprehend the particular danger.

10. In instruction No. 3 given to the jury the court said that, if these wires and electrical appliances were so placed in the vicinity of the house where children might reach or come in contact therewith, then the defendant was under the duty to exercise the highest degree of care, etc. Defendant complains of this instruction, and says that it is not the possibility, but the reasonable probability of children coming in contact therewith which calls for the performance of such duty. While we do not, as plaintiff's counsel suggest, suppose that the jury understood from this direction that defendant was obliged to guard these contrivances from wanton assaults by children who might reach them from ladders or balloons, still we say that the court ought to make it plain to the jury that it is not a mere possibility, but a reasonable probability, of accessibility of the appliances to and by children, in a way similar to that in which plaintiff came in contact with them, that invokes the strict rule laid down.

For the reasons given, the judgment is reversed, and the cause remanded, with leave to the parties to amend their pleadings as they may be advised; and, if another trial be had, it is to be in harmony with the views herein expressed.

Reversed.

STEELE, C. J., and GABBERT, J., concur.

MEMPHIS CONSOL. GAS & ELECTRIC CO. v. BELL.

United States Circuit Court of Appeals, Sixth Circuit — April 5, 1907.

152 Fed. 677.

DEATH OF LINEMAN FROM ELECTRIC SHOCK — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. — In an action for the death of a lineman from an electric shock, it appeared that deceased was an experienced lineman and was familiar with a pole on which were strung not only telegraph wires, but also telephone wires, and, on the cross-arm, the electric light wires of the defendant. The pole stood between two inside parallel electric light wires of the electric company, located about eighteen inches apart. About four feet below the cross-arm which carried the electric light wires was a messenger wire of the telephone company, which was grounded, and this fact was known to the deceased. The inside electric light wire west of the pole was fastened together by a splice at a point about eighteen inches north of and perpendicular to the cross-arm. The distance from this joint in the electric light wire to the nearest point of the messenger wire leading out from the pole on its west was about five feet. The deceased, while stringing wires on this pole received a shock of electricity and fell, receiving injuries from which he died. No one saw him fall, but an examination showed that he had been burned on his left foot and right shoulder. These are the points of his body which would naturally have come in contact — the first with the grounded messenger wire, and the second with the electric light wire at the point where it was spliced, the insulation being off at that point. *Held*, that the question of defendant's negligence, in placing these high tension wires so close together and permitting one of them to be uninsulated, was for the jury; that the question of deceased's contributory negligence was also a question for the jury.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

E. E. Wright and *Edwin Hedrick, Jr.*, for plaintiff.
E. G. Bell, for defendant.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

Opinion by RICHARDS, Circuit Judge:

This was a suit to recover damages for personal injuries resulting in the death of the plaintiff's intestate, D. L. Brooks, a lineman in the employ of the Western Union Telegraph Company at Memphis. This company and the Cumberland Telephone & Telegraph Company were originally joined as codefendants, but during the first trial the suit was dismissed as to them.

The original declaration contained a general charge of negli-

gence against all three companies, and in addition a charge t the present defendant, the Memphis Consolidated Gas & Elec Company, had negligently failed to properly insulate its w where it was known the plaintiff's intestate and other linemen the Western Union Telegraph Company were compelled to w and that it negliegently failed to inspect its wires so as to k them in a reasonably safe condition. The case was twice tr and during the second trial the plaintiff was permitted to am his declaration by alleging that the defendant negligently fai to properly construct its wires upon the pole from which the pla tiff's intestate fell, and placed its high tension wires too cl together, "the said negligent construction and maintenance c sisting in placing said high tension wires eighteen inches apa As already indicated, the case has been twice tried, the co setting aside the first verdict, because not satisfied that plain was entitled to recover, and sustaining the second, although s indicating the impression that it should have withdrawn the c from the jury. In other words, the court was unable, after sitti through two trials, to satisfy itself upon the point whether t case was or was not one for the jury. The court indicates, ho ever, in its final word that it is disposed to think that in th circuit perhaps a more stringent rule than obtains elsewhere h been established with respect to companies using dangerous cu rents of electricity upon wires strung in the streets.

It is now contended that the court should have directed a v dict for the defendant on the ground that the testimony not o

the electric light wires was a messenger wire of the Cumberland Telephone & Telegraph Company, which was "grounded," and this fact was known to Brooks. The inside electric light wire west of the pole was fastened together by a splice at a point about eighteen inches north of and perpendicular to the cross-arm. The distance from this joint in the electric light wire to the nearest point of the messenger wire leading out from the pole on its west was about five feet. On the day mentioned Brooks was ordered to string some wires for the Western Union Telegraph Company on this pole. While engaged in this work he received a severe shock of electricity and fell from the pole to the pavement, receiving injuries from which he died within a few hours. No witness saw him fall. An examination of his person showed that he had been burned in two places, on the left foot and right shoulder. These are the points of his body which would naturally have come in contact — the first with the grounded messenger wire, and the second with the electric light wire at the point where it was spliced. An examination of this splice disclosed the fact that the tape had become worn and weather-beaten and, at the point where Brooks' shoulder touched it, there was no insulation. The current of electricity had burned away the tape which remained, so the wire at this point was bare. There was testimony which showed that Brooks had been warned about these electric light wires and all similar wires; that they were dangerous, and, whether insulated or not, they should be treated as live wires. These were high tension wires, carrying a voltage of from 2,000 to 2,300 volts, an electric current dangerous to life.

The negligence charged against the defendant was in placing these high tension wires too close together on the pole, and in not properly insulating the same, and in failing to inspect them so as to keep them in a reasonably safe condition. According to the testimony, the high tension wire which was spliced and not properly insulated, and from which Brooks received the shock which resulted in his death, was not located more than eighteen inches from the next high tension wire on that cross-arm, and the pole was between. We think that the question was properly left to the jury as to whether the company was not negligent in placing these wires in such dangerous proximity. The testimony further showed that the high tension wire in question was not properly

insulated at the splice or joint. But it is said that the lack of in sulation at this point could not have affected injuriously the plain tiff's intestate, because it is impossible to effectively insulate high tension wire of this character, and the deceased was instructe to treat all such wires as live wires, just as if no attempt had bee made to insulate them. But, in view of the fact that such wire are required to be insulated, and that an attempt in this cas was made to insulate the particular wire, and to all appearance i was insulated, and especially since it conclusively appears fron the burns received by the plaintiff's intestate that the deadly cur rent did actually pass through the joint or splice where the insula tion had worn off, we think the court properly left it to the jury to say whether the defendant was not wanting in proper and ordi nary care in placing these high tension wires so close together, and in permitting one of them to become uninsulated at the very point where the lineman was liable to brush against it in ascend ing the pole.

We next come to the question whether the court was justified in leaving the matter of contributory negligence to the jury. There was some testimony tending to show that the lineman, Brooks, on ascending the pole, could have observed, if he had kept his eye open, that the electric light wire was exposed at the joint o splice and therefore was not properly insulated, but we think i was a question for the jury, since the testimony upon this poin was conflicting, as to whether the lack of insulation could be ob served by the lineman while ascending the pole. It is certain tha after the accident a special examination had to be made in orde to discover the extent to which the insulation was worn off, an to thoroughly satisfy himself on that point, the city electricia placed his finger upon the wire where the insulating tape ap peared to be weather worn, and thus allowed himself to be slightl shocked and burned. In taking this view, of course, we reiterat the position taken with respect to the question whether the negli gence of the defendant was properly left to the jury, that whethe the high tension wire was insulated or not must not be regarded a unimportant, as if the company were under no obligation to kee such wires insulated, and linemen had no right to act upon th supposition that they were insulated. While it may be difficul to insulate high tension wires, and to keep them insulated unde

all circumstances, we think in cases like the present, where such wires are strung on the poles along with low tension wires, requiring frequent attention and repairs by the linemen of telegraph and telephone companies, the tendency of the courts is to hold that ordinary care and prudence requires their insulation to be maintained by reasonable inspection and repair, and by the usual methods adopted for such purposes. *Memphis Con. Gas & Elec. Co. v. Letson,* 9 Am. Electl. Cas. 367, 135 Fed. 969, 68 C. C. A. 453.

The strongest point urged against a recovery in this case is that it appears from the burns found upon the body of the plaintiff's intestate that he was in contact with the grounded messenger wire at the time he touched the uninsulated electric light wire, and thus received the current which caused his fall. No one saw lineman Brooks climb the pole and no one saw him when he fell, and his location when he received the current is a matter of inference. The burn through his shirt and on his shoulder indicates that that portion of his body was in contact with the electric light wire where the insulation had worn off near the joint or splice, while the burn on his foot, although on the upper and not the lower part, indicates, so the witnesses say, that the foot was on the grounded wire, but that the current of electricity in passing out of the foot went through the upper part of the shoe, instead of the lower, because there was less obstruction there, the sole of the shoe acting as a resistant to the current. We must concede, however, that if Brooks put himself in contact with the grounded wire, and then touched the uninsulated electric wire, knowing it to be uninsulated, he was guilty of contributory negligence, for he knowingly and unnecessarily put himself in a position of great peril. *Williams v. Choctaw, etc., Ry.* (C. C. A.), 149 Fed. 104. And this is true if he knew that by touching the electric light wire, whether insulated or not, while standing upon or in contact with the grounded wire, he would expose himself to a dangerous current of electricity. In either event, if the proof upon these questions was conclusive, the court should have directed a verdict for the defendant upon the ground of contributory negligence. The question narrows itself to this: Whether, although the electric light wire was apparently insulated, the deceased, while in contact with the grounded wire, was as a mat-

or commercially in use any insulation that was perfectly or a
lutely safe under the conditions, and in the circumstances,
scribed by plaintiff in his testimony and by defendant's witne
The court sustained an objection thereto, and this ruling is
signed as error. Defendant had already produced evidence
the insulation of this wire was that which was ordinarily used
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the arts or commerce a perfect method of insulation, coupled
the fact, which defendant had already brought out in evidence,
it had used the safest known, was germane, and would help
jury in determining the previous condition of the wire; for

the specific charge was not the failure originally to use safe insulating tape on its wires, but omission to keep it so, evidence that the best known, though not absolutely safe, had been used, would aid the jury in ascertaining whether the method, or lack of method, observed by the defendant in inspecting, or failing to inspect, and repair or renew, the covering first put on, was a compliance with the high degree of care demanded of it. Obviously, if a perfect insulating device was known and not used by defendant, the plaintiff might prove it as bearing on a charge of negligence either in failing to use it at first or not properly inspecting in order to maintain its contrivances in a proper condition of safety. For a similar reason defendant should be permitted to show the nonexistence of an entirely safe insulation, which, in connection with evidence that the best known had been used, constitutes evidence responsive to the very issue which the jury must decide. It seems to us that the rejection of such evidence was prejudicial to the defendant, while its admission could not harm the plaintiff. Indeed, in one sense the fact that a perfectly safe insulation is not known might aid plaintiff's cause, in that its nonexistence might require more frequent and diligent inspection than would be necessary were an absolutely safe protection available. Similar evidence was introduced in the *Lawrence Case* and commented on by this court as proper to be considered by the jury on the question of defendant's negligence.

8. Instruction No. 8 was as follows:

> "If this plaintiff was of a degree of intelligence at the time of the accident to know of the dangerous qualities of electricity, still the jury are instructed that, unless he knew or had some notice or reason to believe to the contrary, he is entitled to assume that the company had performed its whole duty in the matter of insulating its wires, and that the same were in safe and proper condition, and to act upon this assumption."

The defendant says that this instruction naturally led the jury to believe that the plaintiff might wholly neglect to take any precautions whatever to avoid danger from coming in contact with these wires, even though he knew of the dangerous qualities of electricity. We are inclined to believe that the instruction is susceptible of such a construction, and that, to prevent any misapprehension, there should be added to it the additional statement that plaintiff, nevertheless, could not recover, unless he exercised

a proper degree of care to avoid the danger, notwithstanding t assumption that defendant had done its duty.

9. We think the court did right in submitting to the jury t question of the alleged contributory negligence of the plainti From the evidence it cannot be said, as a matter of law, that t plaintiff was, or was not, negligent in what he did. We ha already considered a similar question in the case of *Daniels Johnston* (at this term), 89 Pac. 811, and there held, as we ho now, that under the evidence the question was one of fact for tl jury under proper instructions. The jury was advised in th case that plaintiff could not recover if he was guilty of contrib tory negligence, and that was a question of fact for them to dete mine in the circumstances of the case, including the age, exper ence, knowledge, and capacity of plaintiff to apprehend the pa ticular danger.

10. In instruction No. 3 given to the jury the court said th if these wires and electrical appliances were so placed in tl vicinity of the house where children might reach or come in co tact therewith, then the defendant was under the duty to exerci the highest degree of care, etc. Defendant complains of this i struction, and says that it is not the possibility, but the reasonal probability of children coming in contact therewith which ca for the performance of such duty. While we do not, as plainti counsel suggest, suppose that the jury understood from this dir tion that defendant was obliged to guard these contrivances fr wanton assaults by children who might reach them from ladders balloons, still we say that the court ought to make it plain to t jury that it is not a mere possibility, but a reasonable probabili of accessibility of the appliances to and by children, in a w similar to that in which plaintiff came in contact with them, tl invokes the strict rule laid down.

For the reasons given, the judgment is reversed, and the ca remanded, with leave to the parties to amend their pleadings they may be advised; and, if another trial be had, it is to be harmony with the views herein expressed.

Reversed.

STEELE, C. J., and GABBERT, J., concur.

MEMPHIS CONSOL. GAS & ELECTRIC CO. v. BELL.

United States Circuit Court of Appeals, Sixth Circuit — April 5, 1907.

152 Fed. 677.

DEATH OF LINEMAN FROM ELECTRIC SHOCK — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. — In an action for the death of a lineman from an electric shock, it appeared that deceased was an experienced lineman and was familiar with a pole on which were strung not only telegraph wires, but also telephone wires, and, on the cross-arm, the electric light wires of the defendant. The pole stood between two inside parallel electric light wires of the electric company, located about eighteen inches apart. About four feet below the cross-arm which carried the electric light wires was a messenger wire of the telephone company, which was grounded, and this fact was known to the deceased. The inside electric light wire west of the pole was fastened together by a splice at a point about eighteen inches north of and perpendicular to the cross-arm. The distance from this joint in the electric light wire to the nearest point of the messenger wire leading out from the pole on its west was about five feet. The deceased, while stringing wires on this pole received a shock of electricity and fell, receiving injuries from which he died. No one saw him fall, but an examination showed that he had been burned on his left foot and right shoulder. These are the points of his body which would naturally have come in contact — the first with the grounded messenger wire, and the second with the electric light wire at the point where it was spliced, the insulation being off at that point. *Held*, that the question of defendant's negligence, in placing these high tension wires so close together and permitting one of them to be uninsulated, was for the jury; that the question of deceased's contributory negligence was also a question for the jury.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

E. E. Wright and *Edwin Hedrick, Jr.*, for plaintiff.
E. G. Bell, for defendant.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

Opinion by RICHARDS, Circuit Judge:

This was a suit to recover damages for personal injuries resulting in the death of the plaintiff's intestate, D. L. Brooks, a lineman in the employ of the Western Union Telegraph Company at Memphis. This company and the Cumberland Telephone & Telegraph Company were originally joined as codefendants, but during the first trial the suit was dismissed as to them.

The original declaration contained a general charge of negli-

gence against all three companies, and in addition a charge tha the present defendant, the Memphis Consolidated Gas & Electri Company, had negligently failed to properly insulate its wire where it was known the plaintiff's intestate and other linemen o the Western Union Telegraph Company were compelled to work and that it negliegently failed to inspect its wires so as to keep them in a reasonably safe condition. The case was twice tried and during the second trial the plaintiff was permitted to amend his declaration by alleging that the defendant negligently failed to properly construct its wires upon the pole from which the plaintiff's intestate fell, and placed its high tension wires too close together, "the said negligent construction and maintenance consisting in placing said high tension wires eighteen inches apart." As already indicated, the case has been twice tried, the court setting aside the first verdict, because not satisfied that plaintiff was entitled to recover, and sustaining the second, although still indicating the impression that it should have withdrawn the case from the jury. In other words, the court was unable, after sitting through two trials, to satisfy itself upon the point whether the case was or was not one for the jury. The court indicates, however, in its final word that it is disposed to think that in this circuit perhaps a more stringent rule than obtains elsewhere has been established with respect to companies using dangerous currents of electricity upon wires strung in the streets.

It is now contended that the court should have directed a verdict for the defendant on the ground that the testimony not only failed to sustain the charge of negligence, but made out a clear case of contributory negligence. On August 3, 1905, D. L. Brooks was employed by the Western Union Telegraph Company. He was an experienced lineman, having been so engaged for several years, and was familiar with the pole on the corner of Main and Calhoun streets, in Memphis, on which was strung not only the telegraph wires of the Western Union Telegraph Company, but also the telephones wires of the Cumberland Telephone & Telegraph Company, and, on the lower cross-arm, the electric light wires of the defendant, the Memphis Consolidated Gas & Electric Company. The pole stood between two inside parallel electric light wires of the electric company, located about eighteen inches apart. About four feet below the cross-arm which carried

the electric light wires was a messenger wire of the Cumberland Telephone & Telegraph Company, which was "grounded," and this fact was known to Brooks. The inside electric light wire west of the pole was fastened together by a splice at a point about eighteen inches north of and perpendicular to the cross-arm. The distance from this joint in the electric light wire to the nearest point of the messenger wire leading out from the pole on its west was about five feet. On the day mentioned Brooks was ordered to string some wires for the Western Union Telegraph Company on this pole. While engaged in this work he received a severe shock of electricity and fell from the pole to the pavement, receiving injuries from which he died within a few hours. No witness saw him fall. An examination of his person showed that he had been burned in two places, on the left foot and right shoulder. These are the points of his body which would naturally have come in contact — the first with the grounded messenger wire, and the second with the electric light wire at the point where it was spliced. An examination of this splice disclosed the fact that the tape had become worn and weather-beaten and, at the point where Brooks' shoulder touched it, there was no insulation. The current of electricity had burned away the tape which remained, so the wire at this point was bare. There was testimony which showed that Brooks had been warned about these electric light wires and all similar wires; that they were dangerous, and, whether insulated or not, they should be treated as live wires. These were high tension wires, carrying a voltage of from 2,000 to 2,300 volts, an electric current dangerous to life.

The negligence charged against the defendant was in placing these high tension wires too close together on the pole, and in not properly insulating the same, and in failing to inspect them so as to keep them in a reasonably safe condition. According to the testimony, the high tension wire which was spliced and not properly insulated, and from which Brooks received the shock which resulted in his death, was not located more than eighteen inches from the next high tension wire on that cross-arm, and the pole was between. We think that the question was properly left to the jury as to whether the company was not negligent in placing these wires in such dangerous proximity. The testimony further showed that the high tension wire in question was not properly

insulated at the splice or joint. But it is said that the lack o sulation at this point could not have affected injuriously the p tiff's intestate, because it is impossible to effectively insul high tension wire of this character, and the deceased was instr to treat all such wires as live wires, just as if no attempt had made to insulate them. But, in view of the fact that such are required to be insulated, and that an attempt in this was made to insulate the particular wire, and to all appearan was insulated, and especially since it conclusively appears the burns received by the plaintiff's intestate that the deadly rent did actually pass through the joint or splice where the in tion had worn off, we think the court properly left it to the to say whether the defendant was not wanting in proper and nary care in placing these high tension wires so close toge and in permitting one of them to become uninsulated at the point where the lineman was liable to brush against it in as ing the pole.

We next come to the question whether the court was justifi leaving the matter of contributory negligence to the jury. T was some testimony tending to show that the lineman, Brook ascending the pole, could have observed, if he had kept his open, that the electric light wire was exposed at the joi splice and therefore was not properly insulated, but we thi was a question for the jury, since the testimony upon this was conflicting, as to whether the lack of insulation could b served by the lineman while ascending the pole. It is certain after the accident a special examination had to be made in to discover the extent to which the insulation was worn off, to thoroughly satisfy himself on that point, the city electr placed his finger upon the wire where the insulating tap peared to be weather worn, and thus allowed himself to be sli shocked and burned. In taking this view, of course, we reit the position taken with respect to the question whether the gence of the defendant was properly left to the jury, that wh the high tension wire was insulated or not must not be regard unimportant, as if the company were under no obligation to such wires insulated, and linemen had no right to act upo supposition that they were insulated. While it may be di to insulate high tension wires, and to keep them insulated

all circumstances, we think in cases like the present, where such wires are strung on the poles along with low tension wires, requiring frequent attention and repairs by the linemen of telegraph and telephone companies, the tendency of the courts is to hold that ordinary care and prudence requires their insulation to be maintained by reasonable inspection and repair, and by the usual methods adopted for such purposes. *Memphis Con. Gas & Elec. Co. v. Letson,* 9 Am. Electl. Cas. 367, 135 Fed. 969, 68 C. C. A. 453.

The strongest point urged against a recovery in this case is that it appears from the burns found upon the body of the plaintiff's intestate that he was in contact with the grounded messenger wire at the time he touched the uninsulated electric light wire, and thus received the current which caused his fall. No one saw lineman Brooks climb the pole and no one saw him when he fell, and his location when he received the current is a matter of inference. The burn through his shirt and on his shoulder indicates that that portion of his body was in contact with the electric light wire where the insulation had worn off near the joint or splice, while the burn on his foot, although on the upper and not the lower part, indicates, so the witnesses say, that the foot was on the grounded wire, but that the current of electricity in passing out of the foot went through the upper part of the shoe, instead of the lower, because there was less obstruction there, the sole of the shoe acting as a resistant to the current. We must concede, however, that if Brooks put himself in contact with the grounded wire, and then touched the uninsulated electric wire, knowing it to be uninsulated, he was guilty of contributory negligence, for he knowingly and unnecessarily put himself in a position of great peril. *Williams v. Choctaw, etc., Ry.* (C. C. A.), 149 Fed. 104. And this is true if he knew that by touching the electric light wire, whether insulated or not, while standing upon or in contact with the grounded wire, he would expose himself to a dangerous current of electricity. In either event, if the proof upon these questions was conclusive, the court should have directed a verdict for the defendant upon the ground of contributory negligence. The question narrows itself to this: Whether, although the electric light wire was apparently insulated, the deceased, while in contact with the grounded wire, was as a mat-

ter of law guilty of negligence in permitting himself to co
contact with it. In other words, ought the jury to have
permitted to pass upon the question whether the deceased wa
ligent in permitting himself to come in contact with the el
light wire under the circumstances? While the question inv
is a close one, and the court naturally remained in doubt
the correctness of its conclusion until the end, we think the
sion was a correct one. The matter was properly left wit
jury. It is not to be assumed that Brooks intended to co
suicide. The natural inference is that he relied, and had
sonable grounds to rely, on the insulation of the electric
wire when he attempted to pass by it while in contact wit
grounded messenger wire. Whether he did so rely, and wh
he had good reason to, and whether under the circumstanc
was or was not guilty of negligence, were, in our opinion,
tions which the court, under pertinent instructions, properl
for the jury to decide.

Judgment affirmed.

HOME TELEPHONE CO. v. FIELDS.

Alabama Supreme Court — April 17, 1907.

150 Ala. 306, 43 So. 711.

1. TELEPHONE COMPANY — CARE OF WIRES — INJURIES — PROXIMATE
— It is the duty of a telephone company to look after its own wir
to see that they are not left in a dangerous position, and wher
abandoning a system a company left wires hanging in a tree
coming in contact with a live trolley wire carried the current to a
and a traveler touching the fence was killed by a shock, the neg
of the company in leaving the wires in the tree was the proximat
of the accident.
2. RELEASE OF JOINT TORTFEASORS. — Where injury from contact w
electric wire was caused by the negligence of a railway company
telephone company, a release of the former expressly stating tha
not a release of the latter, releases the telephone company from li
only *pro tanto.*

Appeal by defendant from a judgment for plaintiff. *Aff*

Pillans, Hannaw & Pillans, for appellant.

Gregory L. & H. T. Smith, for appellee.

Opinion by HARALSON, J.:

The plaintiff's evidence tended to show, without dispute, that Robert Isble, the son of plaintiff, while walking along Davis avenue, in a suburb of Mobile, walked beneath an oak tree, on the edge of a public road, and touched a wire fence that was nailed to the tree, and was killed by an electric shock therefrom.

The evidence of the plaintiff showed, that a trolley pole of the Mobile Light & Railroad Company projected into the branches of this tree; that through this trolley pole ran an eye-bolt that supported the span wire that held up the trolley wire which was heavily charged with electricity; that on the other edge of this bolt, and on the outside of the trolley pole, was a nut, which had a round and a square face, the round face being towards the pole, and between the nut and pole was a washer; that the defendant, the Home Telephone Company, had formerly maintained a telephone system to Toulminville by means of a number of wires which were suspended on poles, and which ran along Davis avenue through the branches of said oak tree; that this telephone system had been abandoned some months before the accident, and the wires and poles had, generally speaking, been removed by defendant, but several of these wires had been left dangling down through the branches of said tree. One witness testified that one of these wires was left dangling from a pole to which the wires had been attached and others testified that they were left hanging in the branches of the tree but were detached from the poles. It was further shown for the plaintiff, that, at the time of the accident, one of these wires extended from the branches of the tree and was jammed between the washer and nut already described, so tightly that the employee of the Mobile Light & Railroad Company, who removed the wire, could not jerk or swing it loose from the ground, and had to climb the pole with a ladder and knock it loose from behind. Several witnesses testified — some of them, that they had seen wires hanging from this tree for some time before the accident, some of them, that they had noticed them for about a week before, and some, that they had noticed them as early as the preceding spring. One of them testified, that the trolley pole and the tree were about the same height, and that the bolt and nut were only a few feet below the top of the pole, and one of them, that the wire was lying

across the top of the tree, and thence down across the nut ar washer, and others still, that the wire extended from the branch of the tree down through the washer. One witness describ the telephone wire as extending from the nut and bolt, so as touch the wire fence, and one, that when he found it, just aft the accident, the telephone wire was "kind of hooked to tl fence as though somebody had bent the end of it to keep it fro swinging," and when a trolley is properly suspended, the sp wire is dead and not a live wire, and this span wire should l properly attached to the trolley by means of a bell which shoul be insulated, but, in this instance, the trolley wire ran throug the bell to the span wire and out to the eye-bolt where the tel phone wire was jammed and communicated in this manner to th wire fence.

It was admitted that the defendant company was, at the tim of the accident, doing business in and around Mobile as a tel phone company and serving the public in the maintenance of telephone system.

The defendant introduced evidence tending to show, that befo the accident they pulled down all their wires through this tr and none were left.

The first plea of the defendant was the general issue. Tl second, that the Mobile Light & Railroad Company was a joi tortfeasor with the defendant, and that plaintiff had entered in a settlement and composition with said railroad company, l which the plaintiff had made and executed a full release of ar and all claims for damages.

The fourth plea set up this receipt *in hæc verba,* which appea to be in partial discharge of liability, which the plaintiff co tends was a payment and discharge of defendant's liability *p tanto.*

The only ruling upon the pleading was that sustaining tl demurrer to the third plea, which set up an absolute bar to tl plaintiff's entire action, the fact that she had executed the recei which is set out in full in said plea.

The court accorded to the defendant, in mitigation of damag and as a payment *pro tanto* in discharge of its liability, the amou named in said receipt as was set up in the defendant's four plea. The third plea set up said release as an absolute bar the entire action.

The plaintiff admitted she had executed said release, which was in words and figures as follows:

"Received August 28, 1905, of the Mobile Light & Railroad Company one hundred dollars, in part payment of such amount as I, as the administratrix of the estate of Robert Isble, deceased, may be entitled to recover for or on account of his death, which I claim to have occurred on the 11th day of August, 1905, by reason of the joint negligence of the said Mobile Light & Railroad Company and of the Home Telephone Company.

"The Mobile Light & Railroad Company denies that it was guilty of any actionable negligence resulting in the death of the said Robert Isble, but makes said payment in full compromise and settlement of any claim that I, as such administratrix may have or claim to have against it on account of said death, and I, as such administratrix hereby release and discharge said company from all further claims on account of said death. It is, however, expressly understood and agreed that this payment is made only on account of any sum that I may be entitled to recover for the death of said Robert Isble, and in consideration of my release of the said Mobile Light & Railroad Company from any liability for damages on account of said death, but it is not intended as a satisfaction of the entire amount that I may be entitled to for said death nor as a release of any claim that I may have against the Home Telephone Company, or against any other person or corporation other than the Mobile Light & Railroad Company on account of the death of said Robert Isble.

"[Signed] HENRIETTA FIELDS."

As to whether this release was a discharge in full to each of the joint tortfeasors, as contended by defendant, it will be well to notice the recitals of the release. They are:

"It is, however, expressly understood and agreed that this payment is made only on account of any sum that I may be entitled to recover for the death of the said Robert Isble, and, in consideration of my release of the Mobile Light & Railroad Company from any liability for damages on account of said death, but it is not intended as a satisfaction of the entire amount that I may be entitled to for his said death, nor as a release of any claim that I may have against the Home Telephone Company, or against any other person or corporation other than the Mobile Light & Railroad Company on account of the death of said Robert Isble."

These demurrers, therefore, presented the question whether a release of this character by which one of the joint tortfeasors pays a certain sum of money in partial satisfaction and with the express understanding and agreement that it shall not release the other joint tortfeasor, must nevertheless be held to have this effect.

Sections 1805 and 1806 of the Code of 1896, provide that "all receipts, releases and discharges in writing, whether of a

debt of record, or a contract under seal, or otherwise, must have effect according to the intention of the parties thereto" (citing a number of our cases); and "all settlements in writing, made in good faith for the composition of debts, must be taken as evidence and held to operate according to the intention of the parties though no release under seal is given, and no new consideration has passed."

In 24 Am. & Eng. Enc. of Law (2d ed.) 307, the rule is stated:

"But it is a well-settled rule, that when a release of one wrongdoer is not a technical release under seal, then the intention of the parties is to govern, and it becomes a question of fact for the court and jury whether, or not, what the releasor has received was received in full satisfaction of his wrong, and if it appears that it was not so received, it is only *pro tanto* to bar the action against the other wrongdoers," citing the case from this court of *Smith v. Gayle*, 58 Ala. 600, 607, where it is said: "If the purpose is to discharge a debt due by record, or by a specialty, and that purpose is expressed in writing, it is not now material whether the writing is under seal or not; nor is it material though a smaller sum is accepted, than is really due. If the purpose is to release a part only of a demand, and not the whole, or only one of several jointly liable, it is a release only *pro tanto*. No other or greater effect can be given it than the parties intended. A release to one of several joint contractors, though the creditor should retain the right to proceed against the others, would release them, to the extent that they could demand contribution from their associate who is released. It would have no other operation. * * * If any larger operation was given it, the intention of the parties would be defeated." *Cowan v. Sapp*, 74 Ala. 50; *Snow v. Chandler*, 10 N. H. 92, 34 Am. Dec. 140.

The contention of learned counsel for defendant, that the grounding of the foregoing decision in this opinion upon the statute was unnecessary, and was, in that respect, dictum, and has no application to this case, or if it be regarded as applicable, then the decision is wrong in principle, so far as it depends on the statute for vitality, cannot be admitted. It is too well settled to the contrary.

That the negligence of the telephone company in permitting its wires to swing down constitutes such negligence as will support an action of this character, seems too clear for dispute. *S. B. T. & T. Co. v. McTyer*, 8 Am. Electl. Cas. 591, 137 Ala. 601, 613, 34 So. 1020, 97 Am. St. Rep. 62; *Jones v. Finch*, 8 Am. Electl. Cas. 497, 128 Ala. 217, 29 So. 182.

In the first case cited it was said:

"The presence of a dangerous thing is not justified by any consideration of public good or convenience. * * * So when they [the wires] were orig

inally carried into the building and equipped and maintained to supply the service to the owner, but at his instance the service has been discontinued and the instrument removed, and the company instead of then removing the wires, merely cuts them loose from the instrument, twists their ends together and leaves them thus dangling in the building, so that atmospheric electricity, striking them anywhere along their course on the outside, will be inducted into the building and there discharged to the peril of persons and property, this is an unpalliated wrong on the part of the company. It is the creation and maintenance of a dangerous situation without the warranting occasion for it which may exist when the lines are in use — without any occasion whatever in fact; and the company is liable in damages for whatever injuries may result to persons and property rightfully on the premises."

As to the suggestion that a stranger may have intervened and bent the dangerous wire to the fence, and that this act was the proximate cause of the injury, it may be said that there is no proof of the intervention of a stranger in this matter. One witness testified that the wire came down, "so as to touch the wire fence," and another, that the telephone wire was "kind of hooked to the fence as if some one had bent it to keep it from swinging." How this happened and by whom, it does not appear. It may have been done, if at all, from aught appearing, by one of defendant's employees. If the wire was loose and dangling in the streets, without being fastened to anything, would it not have been quite as dangerous, if not more so, than if it had been tied to the fence? In either case, it would have been dangerous, and liable to charge the fence with electricity; and whether the fence was charged with electricity from the act of the defendant, or from its act and that of the railroad company jointly or concurrently, either act would be counted as the proximate cause of the injury, if one resulted to a passerby. As observed in the case of *Thompson v. L. & N. R. R. Co.*, 91 Ala. 501, 8 So. 406, 11 L. R. A. 146:

"If the original wrong becomes injurious only in consequence of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong. But, if the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some other person, and does actually result in injury, through the intervention of causes which are not wrongful, the injury shall be referred to the wrongful cause."

"If damage has resulted directly from concurrent, wrongful acts of two persons, each of them may be counted on as the proximate cause, and the parties held responsible jointly or severally for the cause." Cooley on Torts, pp. 68, 69, 70, 78.

"If the defendant's wrongful act is one of two or more concurrent efficient causes other than plaintiff's fault, which co-operate directly to produce the

result, this, under the authorities, is all that is requisite for fastening liability on him." *W. R. of Ala. v. Sistrunk*, 85 Ala. 357, 5 South. 79.

It cannot be denied that it is the duty of a telephone company to look after its own wires, and to see that they are not left in a dangerous position, and a failure to do this is a proximate cause of injury which results from a loose wire falling into the street. *Ahern v. O. T. & T. Co.*, 4 Am. Electl. Cas. 349, 33 Pac. 403, 35 Pac. 549, 24 Ore. 276, 22 L. R. A. 635.

In *S. S. & S. R. Co. v. Owen*, 132 Ala. 420, 31 So. 598, it was held that when negligence of a carrier creates an apparent necessity for a passenger to leap from a moving car, and the leap produces injury, the negligence is the proximate cause of the injury.

It is not denied that the railroad company was a tortfeasor in this case, and under the evidence, it is apparent, that the defendant company was also guilty of a wrongful act. It is manifest that the leaving of a wire of the company to dangle from the tree was a piece of gross negligence, which must be regarded as the proximate cause of the injury.

We have thus held that the receipt given by plaintiff to the railroad company releases the company from liability only *pro tanto;* that the negligence of defendant in leaving a loose wire dangling from a tree, so as to come in contact with a highly charged trolley wire, must be treated as the proximate cause of injury to plaintiff's intestate. These are the only questions presented for review.

The appellant did not in brief treat the charges in detail, which were requested by it and refused, nor did the appellee. Both apparently regarded them as involved in the principles discussed and which we have decided adversely to the appellant. They were properly refused.

Affirmed.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

CHICAGO SUBURBAN WATER & LIGHT CO. v. HYSLOP.

Illinois Supreme Court — April 18, 1907.

227 Ill. 308, 81 N. E. 379.

1. INJURY TO TROUBLE SHOOTER FROM CONTACT WITH LIVE WIRE — CONTRIBUTORY NEGLIGENCE — ASSUMPTION OF RISK — QUESTIONS FOR JURY. — In an action by a trouble shooter, a man employed to repair and correct outside lines, to recover for injuries sustained by coming in contact with a live wire, while placing a fuse plug in a transformer, it appeared that the plaintiff was ordered by the chief electrician to shake certain wires and was thereby injured, that the wires in question were improperly insulated, and that plaintiff had no knowledge that they were dangerous. It was *held* that the question whether plaintiff assumed the risk or was guilty of contributory negligence was for the jury.
2. SAME — EVIDENCE. — Where the declaration charged that the plaintiff was ordered by the defendant to take hold of and shake the wire, and that he was unaware at the time that said wire was charged with and carrying a current of electricity, it was proper to introduce evidence both as to the condition of the insulation on the wire and as to defendant's custom and practice with reference to turning on the current.
3. SAME — QUESTION FOR JURY — INSTRUCTIONS. — Where the plaintiff, in an action for injuries sustained by contact with a live wire, must have known of the defective insulation, it was still a question for the jury whether there was a custom and practice of the defendant to notify employees before turning on the current, and, if there was such custom, whether plaintiff was justified in relying upon it and obeying an order to take hold of the wire. An instruction taking such questions from the jury was properly refused.

Appeal by defendant from a judgment of the Appellate Court, affirming a judgment of the Superior Court, for plaintiff. *Affirmed.*

Statement of facts by FARMER, J.:

This is an appeal from a judgment of the Appellate Court affirming a judgment in favor of appellee for $4,000 damages for a personal injury to appellee alleged to have resulted from the negligence of the appellant, his employer. The facts were briefly stated by the Appellate Court, as follows: "Defendant operated an electric light plant, and had as a part of its plant a pole at the corner of Erie and Grove streets, Oak Park, at the top of which was a transformer. A primary high potential current of electricity was carried to the transformer by a circuit running from the dynamo, was changed in the tansformer by induction to a low potential secondary or service current, which was carried from the transformer by a circuit to which the lamps were attached. The wire which ran from the dynamo was connected with the induction coil in the transformer by what is by the witnesses called a 'fuse' or 'fuse plug.' The fuse or fuse plug consisted of the fuse box, which was a

part of the transformer, of a fuse plug, which fitted into the fuse box and could be taken out and put back, and of the fuse proper, which was a narrow strip of fusible metal intended to connect the end of the wire which ran from the dynamo with the end of the wire which formed the induction coil. When this strip of metal is melted, the circuit is broken, and the fuse is said to be 'blown.' Plaintiff, when he was hurt, was nineteen years old, had been in the employ of the defendant a year and a half, and during the six months preceding his injury had considerable experience in 'trouble shooting' or 'chasing trouble;' that is, in repair work on the lines of defendant. July 19, 1902, between 4 and 5 in the afternoon, Mr. Privat, the chief electrician of defendant, took plaintiff in his buggy at the power house and went to hunt for a break in defendant's lines. They went to the pole above referred to, and plaintiff, by order of Privat, climbed the pole, found that a fuse in the transformer had been 'blown,' and so told Privat, who directed the plaintiff to put in a new fuse. Plaintiff took out the plug, put a new fuse in it, and pushed the plug back into the fuse box. Privat then asked plaintiff in which circuit he found the fuse out. Plaintiff answered, in the circuit running east from Grove avenue. Privat could not see the wires distinctly from the ground where he was, and told plaintiff to shake the wire that connected the fuse that was out. Plaintiff took hold of the wire to shake it, and a current of electricity passed through his body, and he fell to the ground and received the injury complained of. The wire which the plaintiff caught hold of had been insulated at one time, but the insulation was then defective, and had been in that condition for a long time."

Wood & Oakley (*Horace S. Oakley,* and *Albert M. Kales,* of counsel), for appellant.

Theodore G. Case (*Benjamin D. Magruder,* of counsel), for appellee.

Opinion by FARMER, J.:

Appellant contends that a verdict should have been directed by the trial court in its favor, first, because the evidence so conclusively showed appellee guilty of negligence that no other conclusion could be reached by reasonable minds; second, because the evidence clearly showed appellee assumed the risk of injury; and that under the evidence these were questions of law for the court and not of fact for the jury. These questions have been preserved for review in this court by motions made on the trial at the conclusion of plaintiff's evidence, and again at the conclusion of all the evidence, to direct a verdict in favor of appellant. With the questions thus preserved, it becomes our duty, not to weigh and determine conflicting testimony, but to examine the evidence to determine whether there is any testimony, with all the inferences reasonably to be drawn therefrom, fairly tend-

ing to establish the plaintiff's case. While ordinarily, the questions of negligence and of assumed risk are questions of fact to be submitted to a jury, yet, where the facts admitted or conclusively proven are such that all reasonable minds must reach the same conclusion, then they become questions of law. *Wabash Railway Co. v. Brown,* 152 Ill. 484, 39 N. E. 273. "The weight of the evidence is a question for the jury, but whether there is any evidence fairly tending to support a cause of action is a question for the court." *Chicago & Alton Railway Co. v. Pettit,* 209 Ill. 452, 70 N. E. 591.

Appellee and William Lossin were the only witnesses who testified in his behalf as to the facts upon which his right to recover depend. Appellant offered no witnesses, except B. L. Dodge, its manager, who had no personal knowledge of how the injury occurred. His testimony was very brief, and principally as to formal matters. We have carefully read all of the evidence from the abstract and some of it from the record. The substance of the most material parts of appellee's testimony may be stated as follows: He was nineteen years old at the time of his injury, and had worked for appellant nearly two years. He had had no experience with electricity before he began working for appellant. He was first put to reading meters and doing inside work in helping to wire houses. After he had been in appellant's employ a year, he was sometimes ordered to do "trouble work" or "trouble shooting," which the witnesses explain to mean repairing and correcting outside lines. Mr. Privat, appellant's chief electrician, took him, on the day of his injury, to the place where said injury occurred, to find and correct some trouble that existed with one of the circuits. It was a drizzly, rainy day. While remedying the difficulty, appellee was injured in the manner set forth in the statement of facts above quoted from the Appellate Court opinion.

Appellee testified that, when employees were working on the wires outside, appellant's manager or chief electrician would tell them when the current was turned on; that when a plug which has been fused is inserted in place, if the current is on, it will make sparks. When he inserted the plug, after fusing it, he said, on direct examination, there were no sparks at all, and that indicated to him there was no current on the line. On cross-exam-

ination, in answer to the question, "Did you look for a spark?" he said, "No; I did not see any." He further stated, on cross-examination, that the company would tell employees when it turned the current on; that it was sometimes turned on early on dark days. The appellee was unable to state just where he took hold of the wire at Mr. Privat's direction. He said he just reached out with his right hand and caught it. He knew it was dangerous to take hold of a live, uninsulated wire with the naked hand. He did not remember whether he looked to see if the insulation was in good condition at the place he took hold of the wire. If he had looked, he could have seen whether it was covered with insulation or not. He stated he saw the insulation was off at the wire connections, but that he did not take hold of the wire at the point of connection. The connections were right next to the cross-arms, and he was unable to state whether he came in contact with the bare connections. Appellant was in the habit of furnishing rubber gloves to employees who were expected or required to work with or about live wires. With such gloves there was little or no danger in handling wires charged with electric currents. Appellee had no rubber gloves to use while performing the work at the time of his injury, and says Mr. Privat had none in the buggy.

William Lossin testified he was in the employ of appellant at the time appellee received his injury; that about a month before that time he had climbed the pole appellee fell from, and that the insulation of the wires there was in poor condition; that it was torn and hanging down, and where the connections were made there was no insulation. He further testified that appellant did not need the power in the daytime, which its employees knew; that, when the current was to be turned on, they were informed of it by the superintendent or chief electrician; that repairs on the line were made between 7 in the morning and 5.30 in the evening, while the current was turned off. He also testified that the current was sometimes turned on at 5 o'clock, sometimes 6, sometimes 6.30; that it all depended on the weather; that, if it was a dark day, it would be turned on at 3, 4 or 4.30 o'clock, and this was all known to the men working for appellant.

Appellant insists that the proof shows such a defective condition of the insulation of the wires as to be obvious and appar-

; to any one in the exercise of reasonable care; and that, if pellee did not know its condition, it was due to his want of e; and that, if he did see and know of its condition, he assumed risk of being injured by it in attempting to use it. It must borne in mind that, while there is proof to the effect that on rk days the current was turned on as early as 5 o'clock, or lier, yet the proof tends to show this was not the regular prace, and that, except on account of dark days, there was no curit so early in the day. Under this state of the case, should be said, as a matter of law, that by taking hold of the defecely insulated wire with the naked hand appellee was guilty negligence or assumed the risk of injury thereby, and his ht to recover therefor should have been determined by the irt, and not submitted to the jury? It should also be borne in nd that appellee was acting under the directions of appellant's ief electrician in doing what he did, and even if such direcns were not of a compulsory character, and if made without tual knowledge on the part of said electrician of the defective ndition of the insulation, this must be considered, in deterning whether appellee was guilty of negligence or whether he sumed the risk, in connection with the appellee's own knowlge that the current was not usually turned on at such an early ur, and the further proof that, when the men were working the outside lines, they were notified before the current was rned on. There is no proof tending to show he knew there is any current in the wire. He testified there were no sparks, that he did not see any, when he inserted the fuse plug, and at this indicated to him there was no current. He does not pear to have had any other means for determining whether ere was a current on the wire, and no suggestion was made by r. Privat that he make any attempt to discover whether there as a current, or even that there was a possibility of the wire ing charged. True, if the wire had been properly insulated, could have been handled with safety with the naked hand, and it could also without any insulation, if it had not been charged ith an electric current.

It is said by counsel in their very able and ingenious arguent, which we have read with interest, that there is no evidence show appellant sent out to notify men, wherever they might be

working on the lines, that the current was about to be turned on. It is true, no one testified as to how such notice was given, but appellee and Lossin testified that notice of the fact was given employees by appellant. The weight to be given to this evidence was a question for the jury.

It is claimed by appellant that the declaration did not count upon a custom to warn employees that the current was to be turned on and the failure to observe that custom; but that this was the case made by the proof. It is claimed this is such a departure in the proof from the allegations of the declaration that the trial court should have directed a verdict for that reason. The declaration charged that appellee was ordered by appellant to take hold of and shake the wire, and that he was unware at the time that said wire was charged with and carrying a current of electricity. There does not appear to have been any objection made on the trial to the introduction of the proof offered by appellee, on the ground that it was incompetent under the allegations of the declaration, and we are of opinion, if any such objection had been made, it could not have been sustained. The averments of the declaration were sufficient to authorize the proof introduced, both as to the condition of the insulation on the wire and as to appellant's custom and practice with reference to turning on the current in the daytime. We conclude, therefore, there was no error in submitting the case to the jury.

Complaint is made of the refusal of the twentieth instruction asked by appellant. Said instruction is as follows:

"The jury are instructed that if they believe, from the evidence, that the wires of the defendant company at the time and place of the accident in question were in a dangerous condition, and that the plaintiff's injury was a result of that dangerous condition, then, if the jury further believe, from the evidence, that such dangerous condition, if any, which existed was one of the usual and ordinary dangers to which persons in the employ of the defendant company in the capacity in which the plaintiff in this case was employed were exposed and that the plaintiff was sufficiently experienced in the duties of his position to be aware, by the exercise of ordinary observation, of such ordinary observation, of such ordinary and usual dangers, and that the plaintiff in this case, at the time of the accident in question, was in the discharge of the usual, customary, and ordinary duties of his employment, then the plaintiff assumed the risk of such dangerous condition, if any, of the defendant's wires, and your verdict must be for the defendant, even though you further believe, from the evidence, that the plaintiff was ordered to take hold of the wire in question by the superintendent of the defendant company,

present at the time, and that said superintendent of the defendant company knew of the dangerous condition, if any, of the said wires and failed to warn the plaintiff."

It is earnestly argued that the correctness of this instruction is sustained by *McCormick Harvesting Machine Co. v. Zakzewski*, 220 Ill. 522, 77 N. E. 147, 4 L. R. A. N. S. 848. We think there is a plain distinction as made by the proof in that case from the case made by the proof here. In the *McCormick Harvesting Machine Co. Case*, the testimony showed that the plaintiff knew, or by the exercise of his ordinary senses should have known, of the dangers attending the work he was directed by the defendant to do. Such is not the case here. If it be conceded, as was held by the Appellate Court, that appellee must have known of the defective condition of the insulation, it was still a question to be left to the jury to determine from the proof whether there was a custom and practice of appellant to notify employees before turning on the current in the daytime, and, if there was such custom, whether appellee was justified in relying upon it and obeying the order to take hold of the wire. The instruction complained of, if given, would have been understood by the jury as taking that question from them, and to have practically directed a verdict for appellant. We are of opinion that under the facts of the case the instruction was properly refused.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

CARTWRIGHT, J., dissenting.

IN RE LONG ACRE ELECTRIC LIGHT & POWER CO.

New York Court of Appeals — April 30, 1907.

188 N. Y. 361, 80 N. E. 1101.

1. SALE OF FRANCHISE OF ELECTRIC COMPANY — RIGHTS OF INDIVIDUAL PURCHASER AT RECEIVER'S SALE. — The sale of the franchise of an insolvent electric company to an individual, at a receiver's sale, vests in the purchaser all the rights conferred by the original franchise.

Assignment of Franchise. — See note to *Mahan v. Michigan Telephone Co.*, 8 Am. Electl. Cas. 38, 43.

An electric light company cannot without legislative authority sell its franchise and property. *Weld v. Gas & Electric Light Com'rs, post*, 197 Mass. 556, 84 N. E. 101.

2. FRANCHISE TO OPERATE ELECTRICAL CONDUCTORS IS PROPERTY. — A fr chise to operate electrical conductors in the streets is property, taxa alienable, subject to levy and sale under execution and to condemnat under the exercise of the power of eminent domain.

3. MANDAMUS TO COMPEL GRANTING OF SPACE FOR ELECTRICAL CONDUCTOR SUBWAY — CONSENT OF COMMISSIONERS. — Under the New York regulations governing the placing of electrical conductors in the subw a subway company may be compelled by mandamus to grant space such conductors, and it is not necessary to obtain the consent of commissioners before making application to the company.

4. SAME — ASSIGNMENT OF FRANCHISE. — The assignment by an electr company of its franchise to an individual, and the subsequent assign by him to another corporation does not constitute a defense to an ap cation by last assignee for space in a subway.

Appeal from an order of the Appellate Division of the Supre Court in the First Judicial Department, which affirmed an or of Special Term granting a motion for a peremptory writ mandamus to compel the defendant to assign to the petitio space in its subways for electrical conduits. *Affirmed.*

Alton B. Parker and *Henry J. Hemmens,* for appellant.

Charles F. Brown, A. J. Dittenhoefer and *David Gerber,* respondent.

Opinion by O'BRIEN, J.:

This case presents a controversy between two corporatio which assumes the form of an application for a peremptory w of mandamus. The application was granted and the order firmed on appeal. There is no controversy about the facts,

ture, use, or supply electricity." The statute also provides that mandamus may issue if the defendant should refuse or fail to perform the duties and obligations assumed by it. Laws 1887, p. 930, c. 716, § 7.

The relator applied to the defendant with a request that it assign to it space in the subway for its electrical conductors. The request was refused, and hence the application for a writ of mandamus and the controversy presented by this appeal. The refusal was mainly on the ground that the relator was not authorized to operate electrical conductors in the city, and the origin and history of the relator and the franchise in question are very important in considering that question. In March, 1885, a corporation was created to operate electrical conductors in the city of New York, which, for brevity, will be called the "American Company." In May, 1887, the municipal authorities of the city granted to this corporation a franchise to locate and erect poles and hang wires and fixtures thereon and place, construct, and use wires, conduits, and conductors for electrical purposes in, over, and under the streets. In 1888 this corporation, having accepted the franchise, assigned it to another corporation which, for brevity, will be called the "Illuminating Company." The assignment was not made directly to that company, but to one Frederick E. Townsend, on April 18, 1888. On the 29th of December, 1888, Townsend and two other persons filed a certificate by which the Illuminating Company was created. Townsend, obviously being a mere conduit for transmission of the title of the American Company to the Illuminating Company, assigned the franchises to the new corporation. The defendant's contention is that this transaction constitutes a defective link in the relator's chain of title to the original franchise.

In 1889 the Illuminating Company commenced operations under the franchise so acquired by erecting poles and wires, and supplied to the public electric lights to the extent to which its facilities were equal, and continued to do so for more than a year and until its poles and wires were cut down and removed by the municipal authorities, in conjunction with a legislative board, possessing the power to cause all overhead wires to be removed and placed underground. It seems that at that time there were no subways for the reception of electrical conductors in that part

of the city, and the Illuminating Company became incapacitated from fully providing for its customers; but for a considerable time after its poles were removed it continued to furnish lights in the building where its station was located and to other customers in the same block. The destruction of its property resulted in financial embarrassment, and in or about October, 1897, a judgment creditor instituted sequestration proceedings against the corporation and a receiver was appointed. After judgment in November, 1897, the court directed the receiver to sell the franchise at public auction to the highest bidder, and the receiver thereupon sold it to one Minturn, which sale was duly confirmed by the court. In March, 1906, Minturn assigned it to the relator. The relator was incorporated in April, 1903, and was authorized to "manufacture, generate, transmit, furnish, supply and distribute electricity for light, heat, power or other purposes, and to light by electricity streets, avenues, parks, public and private buildings," etc., in the city of New York.

The defendant's principal contention is that the franchise granted by the municipal authorities to the original American Company has not passed to the relator, and that, although it possesses certain powers under its certificate, it has no power to compel the defendant to allot to it space in the subway, not being a corporation authorized to operate electrical conductors.

It seems to me to be very clear that the transfer to Minturn under his purchase at the receiver's sale vested him with all the rights conferred by the original franchise. It cannot be dis-

that the right to this secondary franchise could not be transferred to an individual, the defendant would still have to meet and overcome the objection that such a question could only be raised by the State or by the municipality. If the company has been guilty of an act *ultra vires,* the State might perhaps proceed against it for a forfeiture of its franchise, or the city might, if the question was properly presented, avail itself of it; but it is not open to the defendant to raise the question in this proceeding. It can be of no concern to the defendant whether the relator, deriving its title as stated, or the original company, applied for space in the subway. *Starin v. Edson,* 112 N. Y. 206, 19 N. E. 670; *National Bank v. Matthews,* 98 U. S. 621, 25 L. Ed. 188; *National Bank v. Whitney,* 103 U. S. 99. 26 L. Ed. 443; *Ayers v. Aus. Banking Co.,* L. R. [3 P. C.] 548; *Bath Gas Light Co. v. Claffy,* 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664; *Commonwealth v. Ins. Co.,* 5 Mass. 230, 4 Am. Dec. 50. In Thompson on Corporations, § 6030, the principle is stated as follows:

> "Where a contract of a corporation has been executed by the parties to it, it is not competent for a mere stranger to the contract to assail it and deprive the corporation of the advantage from it upon the ground that it was interdicted by the charter; and in general it may be said that one whose rights are not injuriously affected by reason of the fact that a corporation is acting in excess of its powers or beyond the warrant of law has no standing in court to complain of the same. These considerations bring us to the somewhat new and growing doctrine that whether a corporation has acted in excess of its granted powers or in the face of an expressed or implied statutory prohibition is one which cannot be raised in litigation between it and a private party, or between private parties, but can only be raised by the State in a direct proceeding either to forfeit the franchise of the corporation or to subject it to punishment for doing the unlawful act."

In this view of the case, it is not necessary to go into any extensive examination of the legal question, so ably discussed by counsel, claiming that the corporation to which the secondary franchise was granted was powerless to transfer its rights to an individual.

Considering the condition of the law in this State to-day, concerning the power of a corporation to transfer secondary franchises to an individual, I think it would not be wise to hold that such a transfer is void. The power to mortgage its franchise would seem necessarily to include the power to sell and dispose

of it. The American Company, which procured the franchise, was incorporated under the general manufacturing act of 1848, which gave to corporations organized under it power to hold, purchase, and convey real and personal property. The franchise being property, it could be transferred through the execution of a mortgage; and I am unable to discover any reason why an individual could not purchase any personal property covered by the mortgage. Chapter 638, p. 1436, Laws 1893, confers power on corporations, other than railroad corporations, to sell and convey their franchises to other corporations. While this statute does not apply to the assignment in question, it indicates the public policy of the State. There can be no doubt that in some of the text-books, as well as in some of the adjudged cases, expressions may be found which would seem to support the broad doctrine that such a transfer by a corporation to an individual is absolutely void, and of no more force than if it had never been made. But, whatever may have been the law originally on this question, such a doctrine has long been practically ignored in this State. The text-books also recognize the fact that the drift of authority has been in the direction of sanctioning transfer such as was made to Townsend in this case. Many of the cases where the courts have recognized and sanctioned such transfers do not appear to have been based on any special statute authorizing it. As was said by Judge RUGER in *Woodruff v. Erie Ry. Co.*, 93 N. Y. 609:

"The transfer to an individual may not be expressly authorized by statute, but neither is it expressly prohibited, and the validity of such a transfer, granting the power to make it, is recognized by chapter 582, p. 1335, of the Laws of 1864. We have carefully examined the several cases cited by the learned counsel for the respondent, in support of the claim that the lease to the plaintiff was contrary to public policy and therefore void, and do not think them applicable to the condition of the law as it exists in this State."

Judge ANDREWS, in *Bath Gas Light Co. v. Claffy*, 151 N. Y. 24, 45 N. E. 390, 36 L. R. A. 664, says:

"We think the demands of public policy are fully satisfied by holding that, as to the public, the lease was void; but that, as between the parties, so long as the occupation under the lease continued, the lessee was bound to pay the rent and that its recovery may be enforced by action on the covenant."

In that case the validity of a lease by one lighting company to another was under consideration.

We think that the assignment made by the American Company to Townsend, and the subsequent transfer of the franchise by him to another corporation, did not constitute a defense to the relator's right to exercise the franchise. The most that can be claimed for the transaction is that it was voidable at the election of the State or city. *Woodruff v. Erie Ry. Co., supra; Parker v. Elmira, C. & N. R. R. Co.,* 165 N. Y. 274, 59 N. E. 81; *Minor v. Erie R. R. Co.,* 171 N. Y. 573, 64 N. E. 454; *People v. O'Brien, supra; Bath Gas L. Co. v. Claffy, supra; Palmer v. Cypress Hill Cemetery,* 122 N. Y. 435, 25 N. E. 983; *Holmes & G. Mfg. Co. v. H. & W. Metal Co.,* 127 N. Y. 252, 27 N. E. 831, 24 Am. St. Rep. 448.

The contention is also made in behalf of the defendant that the relator should, in the first instance, have applied to the municipal department having control of the supply of water, gas, and electricity for permission to place its conductors in the subway, and hence that the application for the writ was premature. It is, no doubt, true that the relator must procure such a permit at some time; otherwise the subway cannot be uncovered to receive the cables, or the street interfered with. It is not necessary, however, that the application for such a permit must precede the application to the defendant to assign space. Under the rules governing the municipal department having charge of the water supply, gas, and electricity, it is provided that "when applications have been made and space assigned for conduits under ground the written consent of the commissioner must be obtained before any conductors are placed in the space so assigned." It would be useless for the relator to make an application for a permit to open the subway and interfere with the street until it was first determined whether it could use the subway for its conductors. Indeed, the commissioner, on refusal, could not be compelled to uncover the subway or interfere with the street until the right involved in this application was first determined. *People ex rel. N. Y. Electric Lines Co. v. Squire,* 2 Am. Electl. Cas. 176, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893.

There are some minor questions in the case which have been discussed by counsel, but they seem to have been correctly disposed of in the courts below, and it is not needful to refer to them here. The legal obstacles urged against the relator have been

examined, and we think they are not tenable, or sufficient to defeat the relator's application.

The order appealed from should be affirmed, with costs.

EDWARD T. BARTLETT, HAIGHT, HISCOCK, and CHASE, JJ., concur; CULLEN, C. J., and VANN, J., not voting.

Order affirmed.

HOUSTON LIGHT & POWER COMPANY v. HOOPER.

Texas Civil Appeals, Fourth District — May 1, 1907.

19 Tex. Ct. Rep. 410.

1. INJURY FROM CONTACT WITH LIVE WIRE FALLEN ACROSS GATE — NEGLIGENCE. — In an action by a husband to recover for injuries to his wife by contact with a live wire, it was *held* that the facts justified the jury in finding that the defendant was negligent in permitting a live wire to remain on the yard gate of the plaintiff without warning the inmates of the house of the danger of approaching the gate, and that the plaintiff's wife was injured through such negligence.
2. SAME — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. — The plaintiff's wife was not guilty of contributory negligence in going to the gate and touching the wire, which she did not know was at or near the gate. This question was properly submitted to the jury.
3. SAME — PLEADING — PROOF — VARIANCE. — Where the plaintiff alleged that a power company negligently fixed and used its wires for the transmission of electricity over and upon plaintiff's premises, and allowed said wires to become broken and fall down across plaintiff's gate, and some of the evidence indicated that the wires were suspended along the sidewalk, from eight to ten feet from and not across the premises of the plaintiff, there was not a fatal variance.
4. SAME — MISSTATEMENT IN CHARGE. — There is no materiality in the misstatement in the charge that plaintiff alleged that electricity was conveyed along the streets of a certain city, where the allegation was that it was conveyed over and across the premises of plaintiff.

Appeal by defendant from a judgment in favor of plaintiff. *Affirmed.*

Blake Dupree, for appellant.

A. G. Fisher, Jr., and *Highsmith & McGregor,* for appellee.

Maintenance of Wires by Electric Light Company — Degree of Care Required. — See *Brooks v. Consolidated Gas Co., ante,* and note.

Opinion by FLY, Associate Justice:

Appellee sued appellant to recover damages arising from injuries inflicted upon his wife, Julie E. Hooper, through the negligence of appellant in permitting a wire charged with electricity to fall and remain upon the yard gate of appellee until his wife came in contact with it and was hurt. The cause was tried by jury, and resulted in a verdict and judgment for $1,000 in favor of appellee.

We conclude that the facts justified the jury in finding that appellant was negligent in permitting a live wire to remain on the yard gate of appellee without warning the inmates of the house of the danger of approaching the gate, and that Mrs. Hooper was injured through such negligence in the sum found by the jury. In deference to the verdict, we find that Mrs. Hooper was not guilty of contributory negligence in going to the gate and touching the wire, which she did not know was at or near the gate. It was alleged in the petition that appellant did "negligently and in a negligent and careless manner construct, fix and use its said wire for the use and transmission of its electricity over and upon plaintiff's premises," and further, "That on or about the 29th day of August, 1903, aforesaid, the defendant negligently and carelessly permitted its wires which conducted and transmitted the electric current of the defendant's electricity over and upon the plaintiff's premises, aforesaid, and while said wires were heavily charged with electricity, to become broken, sagged and down and to fall across the plaintiff's gate, the point of entrance and exit to plaintiff's premises," etc. Some of the evidence indicated that the wires were suspended along the sidewalk, from eight to ten feet from and not across the premises of appellee, and it is claimed through the second, sixth and seventh assignments of error that there was a fatal variance between the allegations and proof and that the court should have instructed a verdict for appellant. We cannot sustain that proposition. It was totally immaterial where the wires were suspended, the gist of the matter being whether appellant was guilty of negligence in permitting a wire charged with electricity to fall and remain upon the yard gate of appellant without warning to the occupants of the house of the situation and condition of the wire. If there was any variance it was immaterial and could not have misled or surprised appellant. It knew

where its wires were strung, and knew that it had to meet an allegation that one of them had fallen upon appellee's yard gate and had hurt his wife. Courts of justice will disregard such petty immaterial variances that could have deceived no one. Even in a case where it was alleged that an accident occurred at a certain town in Louisiana, and the proof showed that it occurred at another, it was held that the variance was immaterial, as the defendant was not surprised by it, and had his witnesses present to meet the case made by the proof. *Brown v. Sullivan,* 71 Tex. 470. The same principle is maintained in the cases of *Railway v. Hill,* 71 Tex. 451, and *Railway v. Evans,* 78 Tex. 369.

The court defined contributory negligence and instructed the jury:

"If you believe that the plaintiff's wife did go to the gate and touch the wire and was injured, but believe that under all the facts and circumstances her act in going to the gate and touching the wire was contributory negligence on her part, then you will find for defendant, even though you believe defendant was negligent."

That charge fully covered the facts in the case, and the court did not err in refusing to give a requested charge containing a submission of the same issue. The question of contributory negligence was one of fact to be determined by the jury, under the law as given by the court, and we cannot say that the jury had no facts upon which to base a finding that Mrs. Hooper was not guilty of contributory negligence.

There is no materiality in the misstatement in the charge that appellee alleged that electricity was conveyed along the streets of Houston, when the allegation was that it was conveyed over and across the premises of appellee. It could not possibly have misled the jury in any way.

The court did not err in overruling the motion for a new trial. There is nothing in the application that indicates any effort upon the part of appellant to secure the evidence of the witnesses, whose testimony is claimed to be newly discovered. The witnesses lived in the immediate neighborhood of where appellee lived, and naturally the neighbors would have known the condition of Mrs. Hooper after the accident. The allegations of the petition put appellant upon notice of what would be proved, and some effort should have been made to meet the allegations. No part of the application as to the evidence being newly discovered was verified

by affidavit except that relating to William Lethering, whose affidavit is not appended to the application. It was stated that it was not known where he was until the date of the application, and it is not stated that there was any probability of getting his testimony at another trial. The allegations as to the evidence being newly discovered and the diligence used should have been supported by affidavit. Other grounds on which the application was insufficient were that the evidence was merely cumulative and was only for purposes of impeachment.

The judgment is affirmed.

DROWN V. NEW ENGLAND TELEPHONE & TELEGRAPH CO. ET AL.

Vermont Supreme Court — May 10, 1907.

80 Vt. 1, 66 Atl. 801.

1. INJURY TO LINEMAN — JOINT AND SEVERAL LIABILITY OF TELEPHONE COMPANY AND ELECTRIC LIGHTING COMPANY. — Where a telephone company and an electric lighting company owed separate duties to a lineman of the telephone company, though differentiated by the relations they severally sustained to him, but primary and not secondary as between themselves, and each neglected to perform its duty, with no actual concert of action nor community of design between them, and their negligence concurred to produce a single injury that would not have happened without such concurrence, so that each was a proximate and efficient cause, the injury might be attributed to either or both of the causes, and each of the wrongdoers was liable for the whole damage, and might be sued jointly or severally, at the election of the party injured.
2. SAME — PLEADING. — Where, in an action against a telephone company and an electric lighting company for injury to a lineman of the telephone company, the sole negligence alleged against the lighting company was that it placed and maintained its wires in the dangerous proximity of

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Joint and Several Liability of Telephone Company and Electric Light Company. — Other cases in this volume holding that telephone and electric light companies are jointly liable for injuries resulting from the crossing of their wires. *East Tennessee Telephone Co. v. Carmine, ante; Simmons v. Shreveport Gas, Electric L. & P. Co., ante; Staunton Mut. Tel. Co. v. Buchanan, post; Mangan v. Hudson Riv. Telephone Co., ante.*

Duty of Telephone Companies to See that Other Electric Wires Are at a Safe Distance from Their Own. — See the following cases reported in this volume. *Guinn v. Delaware & A. Telephone Co., ante; Barto v. Iowa Telephone Co., ante; Combs v. Delaware & Atlantic Telegraph & Telephone Co., post.*

twenty-seven inches above the top of the telephone pole on which the plaintiff was working at the time of his injury, it was held that the fact of imperfect insulation, and the escape of electricity by reason of it, sufficiently appeared.

3. SAME — RES IPSA LOQUITUR. — It was an irresistible inference from the above allegation that electricity escaped by reason of imperfect insulation, for otherwise the plaintiff could not have been injured, so the injury was *prima facie* evidence that the company was negligent.

4. SAME — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. — In an action against a telephone company and an electric lighting company for injuries sustained by a lineman of the telephone company, the lighting company having *prima facie* violated its duty to the plaintiff, he must have contributed to the accident by his own negligence, or have voluntarily encountered the danger, in order to prevent his recovery; the fact that the plaintiff may have known of the imperfect insulation is no defense. The question of plaintiff's contributory negligence was for the jury.

5. PROXIMITY OF ELECTRIC LIGHT WIRES TO TELEPHONE WIRES — DUTY OF TELEPHONE COMPANY. — Although an electric lighting company placed its wires in dangerous proximity to the wires of a telephone company, it was as much the duty of the telephone company to remedy the defect as though it had brought it about in the first place.

6. SAME — ASSUMPTION OF RISK. — The dangerous proximity of electric light wires to telephone wires was an extraordinary risk and therefore not assumed by a lineman of the telephone company, unless he knew and comprehended the danger, or it was so plainly observable that he might be taken to have known and comprehended it.

7. SAME — QUESTION FOR JURY. — Where, in an action by a telephone lineman for injuries sustained by coming in contact with electric light wires, it did not appear that the plaintiff ever worked upon the pole before, or ever saw any one work upon it, or ever was upon it for any purpose, and he never was told, and did not know, that it was in dangerous proximity to the electric wires, it was a question for the jury whether the danger was so plainly observable that he knew and comprehended it.

Exceptions by defendant from a judgment for plaintiff. *Affirmed.*

Before ROWELL, C. J., and TYLER, MUNSON, HASELTON, and POWERS, JJ.

W. M. Wright, Frank D. Thompson, and *John W. Redmond,* for plaintiff.

F. E. Alfred and *P. F. Drew,* for telephone company.

Hunton & Stickney, for Consolidated Lighting Co.

Opinion by ROWELL, C. J.:

This is a case for negligence. The declaration contains two counts, and is demurred to by both defendants. The first count

alleges that before and at the time in question the defendant the New England Telephone & Telegraph Company owned and operated a telephone line from Williamstown to Graniteville; that one of the poles of that line stood at the junction of two highways near Graniteville, near the top of which were two cross-pieces to which the wires were fastened; that, in order to attach the wires, and to repair them, it was necessary to climb the pole and work at the top of it; that before and at the time in question the other defendant, the Consolidated Lighting Company, was engaged in generating and selling electricity for artificial light, heat, and power; that after the construction of the telephone line, and before the time in question, the lighting company constructed an electrical line from Barre to Graniteville, consisting of three wires strung on poles, for the purpose of transmitting a powerful current of electricity, dangerous to human life; that the poles of the electrical line were placed on the same side of the highway from said junction to Graniteville as the telephone poles, and for the greater part of the way the electrical wires were strung and maintained above and directly over the poles and wires of the telephone line, and were constructed and maintained directly over the telephone pole at the junction of said highways. The count further alleges that it was the duty of the lighting company so to construct and maintain its line as not to endanger the safety of the telephone company's servants while on the poles of its line, but that the lighting company, disregarding its duty in this behalf, so carelessly and negligently constructed and maintained its line that the wires thereof were only about twenty-seven inches from the top of the telephone pole standing at the junction of said highways, thereby greatly endangering the safety of the telephone company's servants, who had to work at the top of said pole. The count further alleges that at the time in question the plaintiff was in the service of the telephone company as a lineman, and that as such it became and was his duty to climb said pole for the purpose of attaching wires to one of the cross-pieces, and that it was the duty of the telephone company to furnish him a reasonably safe place in which to do that work, but that the top of said pole was an unsafe place "because of the close proximity of the electrical wires," as said company had reason to know, and that it was the duty of said company to render said pole a safe place, either by

removing it, or by compelling the lighting company to remove its wires, neither of which it did, but suffered and permitted said pole and the electrical wires thus to remain in dangerous proximity to each other. The count further alleges that at the time in question said last-mentioned wires were charged with a dangerous current of electricity, and that the plaintiff was wholly ignorant of the close proximity of said wires to said pole, and was wholly ignorant that said pole was an unsafe place to work, and that while at work at the top thereof, fastening wires to one of the cross-pieces, without fault or negligence on his part, but solely in consequence of the negligence of the lighting company in constructing and maintaining its line as aforesaid, and of the negligence of the telephone company in suffering said pole and said electrical wires to remain in such close proximity to each other, he came in contact with said wires, and was burned and injured.

The second count is essentially like the first, except that it omits the allegation that the telephone company had reason to know that the top of said pole was an unsafe place to work, and charges the duty of the defendants as a joint duty, and its breach as a joint breach.

It is objected that the declaration is bad for misjoinder of defendants and causes of action, and urged that the rule of the common law, formulated when almost all the cases of tort were for intentional wrongs — that tortfeasors cannot be joined unless there was concert of action or common design — is most logically applicable to negligence cases also, which have so greatly increased since the introduction of modern utilities. That a broader rule involves a very distinct departure from the original common-law conception of joint tortfeasors. That when two defendants act independently of each other, but their relations to the plaintiff are similar, so that the duties they have violated are of a similar character, and the defenses available to them rest upon the same legal principles, and in general the standard of care and the tests of negligence as against both are substantially the same, it might occasion no serious practical difficulty to try both cases in one action; but that when, as here, the duties that the two defendants are alleged to have violated are entirely different in character, when they stand in entirely different relations to the plaintiff, when the defenses available to them are distinct, and based upon

entirely different legal principles, the danger of confusing the jury with evidence and instructions applicable to one case and not to the other, and the resulting risk of injustice to the plaintiff or to one or both of the defendants, constitute a sufficient objection, both theoretical and practical, to the joinder of two such causes of action in a single count of a single declaration. That the objection of duplicity in common-law pleadings, and of multifariousness in equity, applies with equal force to such a misjoinder, and the fact that the plaintiff's damage is the same in both cases tends only to increase the confusion.

It is true that the common-law rule for joining tortfeasors, when originally formulated, was based upon the conception of concert of action or common design. And it may be true, as claimed, that this conception resulted from the fact that then almost all of the tort cases were for intentional wrongs. But the rule is not confined to intentional wrongs, but embraces unintentional wrongs as well, for all agree that it embraces cases of wrongful neglect of joint duties. The difference of opinion comes when you have wrongful neglect of separate duties; but even here that difference is not so marked when the duties are similar, as it is when they are dissimilar. In the latter case, it is more strongly urged that to impose a joint liability would be an unwarrantable departure from the rule. But it cannot be said to be a departure from the rule to apply it to cases involving elements generically the same, though specifically different; that is, elements that give you concert of action or common design within the meaning of the rule. Now, the rule does not require "actual concert" as distinguished from "passive concert," nor "actual community," as distinguished from "passive community," for, if it does, the wrongful neglect of joint duties would not be within it, for there you have only passive concert or passive community.

Although in respect of negligent injuries there is considerable conflict of opinion as to what constitutes joint liability, yet we think that the weight of authority as well as the principle of the rule sustain this proposition, namely: That when two owe to another separate duties, though differentiated by the relations they severally sustain to him, but primary and not secondary as between themselves, and each neglects to perform his duty, with no actual concert of action nor community of design between them,

and their neglects concur to produce a single injury that would not have happened without such concurrence, so that each is a proximate and an efficient cause, the injury may be attributed to either of both of the causes, and each of the wrongdoers is liable for the whole damage, and therefore they may be sued jointly or severally, at the election of the party injured. This proposition is well exemplified by the numerous cases holding that when a passenger on a railroad train is injured by a collision of his train with the train of another road, caused by the concurrent negligence of both roads, the carrier and the noncarrier are jointly liable. Here the duties are different because of the different relation that each road sustains to the passenger; still, as the breach of their duties concurred in producing the injury, which would not have happened without such concurrence, they are held jointly liable. There are numerous electrical cases essentially like the one at bar in their facts, in which the same thing is held. There are, however, cases that hold the other way. But it is unnecessary to refer to the cases on either side, as they are largely cited in the briefs. Judge COOLEY favors this proposition. Cooley, Torts (3d ed.), 246, 247. And the case in hand comes within it, for by wrongfully neglecting to remedy the dangerous condition complained of, which either could have done, the defendants passively concurred in maintaining and taking the risk of it; and as their neglects in this behalf concurred in producing the plaintiff's injury, which would not have happened without such concurrence, they passively and by community of wrong participated in its infliction, and therefore are jointly liable for it. We are not much impressed by the suggestion that the danger of confusing the jury, and thereby of doing injustice to some of the parties, constitutes a sufficient objection to the joinder, for we do not think that such danger exists to any embarrassing extent. It is true that some courts lay stress upon that, but the more part take no notice of it.

The sole negligence alleged against the lighting company is that it placed and maintained its wires in the dangerous proximity of twenty-seven inches above the top of the telephone pole on which the plaintiff was working at the time of his injury. The company contends that this alone does not make a case of actionable negligence against it; that the question arises whether the injury

was the natural and probable consequence of the negligence alleged, in the sense that a prudent man ought to have foreseen it; that that question cannot be answered in favor of the plaintiff on that allegation, for that the danger comes only when electricity escapes by reason of defective insulation, so that proof of the proximity alleged, without other evidence explaining how the injury occurred, would not be sufficient to show the company guilty of actionable negligence; that the cases uniformly set forth, as the proximate cause of injuries arising from the escape of electricity, a defect or break of the insulation, and no such defect is here alleged; that you cannot answer *res ipsa liquitur,* for, although it may be an irresistible inference that electricity did escape by reason of improper insulation, yet it does not follow from that alone that the company is liable, for it may not have been to blame for it, and, if it was, the plaintiff may have known of the defect as well as the company, and, besides, the declaration excludes any claim of negligence on the part of the company in respect of defective or improper insulation or in any other respect, except only in placing and maintaining its wires in the proximity alleged.

It is undoubtedly an irresistible inference from what is alleged, as counsel seem to think, that electricity did escape by reason of imperfect insulation, for otherwise the plaintiff could not have been burned and injured as alleged, and so the injury speaks for itself to this extent, and is *prima facie* evidence that the company was to blame for it, and guilty of the negligence alleged. This being so, the fact of imperfect insulation, and the escape of electricity by reason of it, sufficiently appear; the rule being that you need not allege what is necessarily implied in what you do allege. Thus, if a man plead that he is heir to such a one, he need not allege that that one is dead, for that is implied, as no one is heir to the living. Thus it appears that the proximate cause of the injury, as counsel call it, namely, the escape of electricity by reason of imperfect insulation, is not wanting, as claimed, and that the declaration does not exclude all claim of negligence in respect of it, for the doctrine of *res ipsa loquitur* is merely a rule of evidence, and, when it is evidence of the negligence alleged, the plaintiff is entitled to the benefit of it.

The suggestion that the plaintiff may have known of the im-

perfect insulation is no answer to the declaration, for it cannot be said that he did know; and, if he did, that alone is not enough, for mere knowledge of a risk does not necessarily involve consent to the risk, for that would be saying "*scienti non fit injuria;*" whereas the maxim is, "*volunti non fit injuria,*" which applies between strangers as well as between master and servant. Hence, the company having *prima facie* violated its duty to the plaintiff, he must have contributed to the accident by his own negligence, or have voluntarily encountered the danger within the meaning of the maxim, and these are questions of fact, as the case is declared upon. *Thrussell v. Handyside,* 20 Q. B. D. 359; *Smith v. Baker* (1891), A. C. 325; *Thomas v. Quartermaine,* 18 Q. B. D. 685, 698.

The telephone company claims that the declaration is bad (1) because it fails to show negligence on its part, (2) because it shows that the plaintiff assumed the risk, and (3) that he was guilty of contributory negligence. The reasons relied upon to sustain the claim of failure to show negligence on its part are summarized as follows: (1) That the duty to provide a reasonably safe place is not absolute, but relative, requiring only reasonable care to provide a reasonably safe place in view of the nature of the business and the circumstances of the case; (2) that the nature of the telephone business, and the manner in which as a practical matter it must be conducted, render it impossible always to avoid the proximity of electric light wires; (3) that the alleged dangerous situation of which the plaintiff complains was not brought about by the company, and does not appear to have been so serious as reasonably to impose upon it the duty of relocating its line; (4) that no lack of warning is relied upon, and it does not appear that warning was not in fact given; (5) that the danger was so obvious that warning was unnecessary; and (6) that it does not appear that the plaintiff's work required him to go within reach of the electric light wires.

But the first two reasons do not show the declaration bad in law. They are only a statement of the character and extent of the company's duty under the law, and of what should be considered in determining whether in fact it performed that duty. As to the third reason, although the alleged dangerous situation was not brought about by the company in the sense that it actively

participated in creating it, yet, if dangerous, it was as much its duty to remedy it as though it had brought it about in the first place; and that it was dangerous is shown by the declaration. As to lack of warning not being relied upon, and its not appearing that warning was not given, it must be borne in mind that the danger complained of is the proximity of the electric wires to the top of the pole; and of that danger, the declaration alleges, the plaintiff was wholly ignorant. This, in effect, is a negation of warning, and a reliance upon lack of warning. As to whether the danger was so obvious that warning was not necessary is involved in assumption of risk, and will be considered in that connection. As to its not appearing that plaintiff's work required him to go within reach of the electric light wires, it is sufficient to say that the declaration alleges that it was necessary to work at the top of the pole, and this the demurrer admits, and it appears that the top of the pole was within reach of the electric wires. As to the assumption of risk: This was not an ordinary risk, and therefore assumed by the plaintiff, but an extraordinary risk, and therefore not assumed by the plaintiff, unless he knew and comprehended it, or it was so plainly observable that he will be taken to have known and comprehended it. The declaration alleges that he did not in fact know it, and the question is whether, in the circumstances alleged, the law will impute knowledge to him. We think it will not. It was the duty of the company to see to it that the electric wires were a safe distance from the pole, and the plaintiff had a right to assume that it had performed that duty, and therefore was not bound to exercise care to find out whether it had or not. *Dunbar v. Central Vt. Railway Co.*, 65 Atl. 528.

The case is not like *Sias v. Consolidated Lighting Co.*, 8 Am. Electl. Cas. 787, 73 Vt. 35, 50 Atl. 554, for there the duty of inspection rested upon the plaintiff. Nor is it like *McKane v. Marr & Gordon*, 77 Vt. 7, 58 Atl. 721, for that was a case of equal knowledge. But here the plaintiff did not know, and was not bound to find out; whereas the company is charged with knowing, because it could have found out by the exercise of proper care. Nor is it like Chisholm against this same company (176 Mass. 125, 57 N. E. 383), on which so much reliance is placed, for there the dangerous condition was not due to the defendant's fault, while here it was. Not yet is it like *Anderson v. Inland Tele-*

phone & Telegraph Co., 7 Am. Electl. Cas. 725, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410, to which reference is made, for there the risk was regarded as ordinary, and therefore assumed by the plaintiff; while here it is regarded as extraordinary, and therefore not assumed by the plaintiff. Nor like *Carr v. Manchester Electric Co.* and *Union Electric Co.*, 7 Am. Electl. Cas. 746, 70 N. H. 308, 48 Atl. 286, for there the plaintiff knew the risk, and therefore was held to have assumed it.

The case is more like *Morrisette v. Canadian Pacific R. R. Co.*, 74 Vt. 232, 52 Atl. 520. There the plaintiff was swept from the side of a moving freight car by a switch standing near the track. It was contended that the danger was so obvious that he assumed the risk. It appeared that he had worked for the defendant several years as brakeman on different parts of the line, and for several months next before the accident, on the part where it happened, and was acquainted with the sidings there, and knew the location of the switch, and had operated it several times. He had never passed it before on the side of a car, and had never been told, and did not know, that it was near enough to the track to sweep one from the side of a car. He had never stayed by the switch when a car passed it, and had always found the other switches on the road safe. The court said that, although the switch was dangerous, only because of its proximity to the track, yet it was impossible to say as matter of law that the danger could be seen and comprehended by mere observation, unaided by measurement, seeing a car pass, or some such thing; that, if it could have been, it was fair to assume that some one whose business it was would have discovered and remedied it, for the switch had stood there several years.

So here much the same thing can be said, for it does not appear that the plaintiff ever worked upon the pole before, or ever saw any one work upon it, or ever was upon it for any purpose; and he never was told, and did not know, that it was in dangerous proximity to the electric wires. We hold, therefore, here, as there, that in the circumstances alleged the danger was not so plainly observable that the law will say that he knew and comprehended it. Obviously, fair-minded men might differ about it. Hence it must go to the jury.

It is equally clear that it cannot be said as matter of law that

the plaintiff was guilty of contributory negligence. That, also, must go to the jury. It is not necessary for present purposes to inquire whether there is any difference between assumption of risk and contributory negligence.

Judgment affirmed, and cause remanded.

DANNENHOWER v. WESTERN UNION TELEGRAPH CO.

Pennsylvania Supreme Court — May 13, 1907.

218 Pa. 216, 67 Atl. 207.

1. DEATH OF ELECTRIC LIGHT TRIMMER FROM CONTACT WITH UNUSED TELEGRAPH WIRE ACROSS ELECTRIC LIGHT WIRE — EVIDENCE. — In an action against a telegraph company for the death of an electric light trimmer from contact with an unused telegraph wire which had fallen across the feed wire of an electric light company, it appeared that the wire had fallen three or four weeks before the accident; that one end of it extended down so near the pavement that children could reach it, and that the other end was wrapped around an iron pole from which deceased was killed. It was held that there was sufficient evidence to sustain a judgment for the plaintiff.
2. PROXIMATE CAUSE. — A negligent act may be the proximate cause of an injury, although not the sole nor immediate cause, where the intervening act is set in motion or induced by the negligent act, and the consequence is one that should have been foreseen.

Appeal by defendants from a judgment for plaintiff. *Affirmed.*

Before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

H. B. Gill, John R. Read, Silas W. Pettit, and *Louis B. Runk,* for appellants.

Francis Fisher Kane, Warren C. Graham, John J. Green, and *Beck & Robinson,* for appellee.

Opinion by FELL, J.:

An unused telegraph wire, which it was alleged belonged to the defendant or was under its control, fell across an electric light

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Telegraph Wires Across Electric Light Wires. — Other cases in this volume relating to injuries to linemen from contact with telegraph wires dangerously charged from electric light wires, see *Toledo Ry. & L. Co. v. Rippon, ante; Martin v. Citizens General Electric Co., ante.*

feed wire of the Northern Electric Light Company. The telegraph wire had been connected with a call box which had been removed some months before the accident. The wire had fallen three or four weeks before. One end of it extended down so near the pavement that children reached and played with it. The other end was wrapped around an iron pole. The deceased was a trimmer in the employ of the electric light company, and was killed by an electric shock while engaged in placing carbons in a lamp attached to the pole. A reversal of the judgment for the plaintiff is asked on the grounds (1) that there was no sufficient evidence that the telegraph wire belonged to the defendant or was under its control; (2) that the falling of the wire was not the proximate cause of the accident; (3) that the presence of the wire and the danger because of its contact with the electric light wire must have been known to the deceased as he ascended the pole.

That the wire was controlled by the defendant was not questioned at the trial, and, while there was no direct proof of its ownership, there was proof that it had been connected with a Western Union call box, and the defendant put in evidence a blue print, made the day after the accident, on which the wire was marked "W. U. Telegraph Wire." This by way of admission supplied any defect in the formal proof of ownership. There was evidence that children had been pulling on the loose end of the telegraph wire, and that the electric light wire on which it rested had sagged, and there were burned marks on the frame of the lamp. Sparks had been emitted by the telegraph wire two weeks before the accident. Two theories of the cause of the accident were advanced at the trial. That of the plaintiff was that the deceased came in contact with the telegraph wire, which had been charged by its contact with the electric light wire; that of the defendant, that he came in contact with the frame of the lamp, which was charged from the electric wire which had been pulled down and brought in contact with it. If the latter theory were correct, it would not follow that the defendant was relieved of responsibility, because it was its wire that either caused the sagging of the electric light wire by dragging it down or was the means by which children drew it down. The latter was a consequence to be foreseen and guarded against, and it did not break the causal connection between the defendant's negligence and the

injury. A negligent act may be the proximate cause of an injury, although not the sole nor immediate cause, where the intervening act is set in motion or induced by the negligent act, and the consequence is one that should have been foreseen. In *Marsh v. Giles,* 211 Pa. 17, 60 Atl. 315, relied on by the appellant, the injury to the plaintiff was caused by the unrelated act of a third party, and was not a probable consequence of the defendant's wrongful act.

The questions of proximate cause under the conflicting testimony, and of contributory negligence were properly submitted. As to the latter, there was no evidence that the deceased had not taken reasonable care to avoid every danger, knowledge of which could be imputed to him.

The judgment is affirmed.

OVERALL v. CITY OF MADISONVILLE.

Kentucky Court of Appeals — May 15, 1907.

125 Ky. 684, 102 S. W. 278.

1. POWER OF CITY TO INSTALL ELECTRIC LIGHTING PLANT. — It is within the police power of cities, even without express authority, to provide public lighting for their streets at the public expense.
2. SAME — POWER TO SELL SURPLUS POWER. — A city authorized to install a lighting plant may sell any surplus power.

Appeal by plaintiff from a judgment for defendant. *Affirmed.*

Laffoon & Yost, Gordon, Gordon & Cox, and *Waddill & Dempsey,* for appellant.

Jonson & Jennings, for appellee.

Opinion by O'REAR, C. J.:

Madisonville is a city of the fourth class. Being out of debt, its city council desired to install a municipal lighting plant, to light the streets and public places of the city, as well as to furnish

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Power of City to Install Electric Lighting Plant. — See *City of Henderson v. Young, ante,* and note thereunder.

Sale of Surplus Power. — City may sell surplus power to private citizens after discharging its duty to the public. *Crouch v. City of McKinney, post.*

electric lights to its inhabitants. The plant was to cost about $27,000, exclusive of lot and building. The revenues and income of the city were alleged to be less than $27,000 a year. The council advertised for bids for machinery, poles, wires, and work necessary to erect and install the plant. Bids were submitted separately for poles, and for machinery set up and connected, for wires put up for incandescent lighting, and for wires put up and connected for arc lighting. The bids were accepted — that is, they were approved as the lowest and best bids — but the contracts were not then let, but were later completed at different times, running through the year. This suit is by a taxpayer to enjoin the execution of the contracts upon the ground that they are void as being in contravention of the constitutional prohibition against the city's becoming indebted in any year in excess of its revenues for that year. The circuit refused the injunction, and dismissed the petition. Hence this appeal.

The principal questions for decision are: (1) Has a city of the fourth class the power to install and own its own lighting plant, to be operated both to light the public places of the city, and to furnish lights to its inhabitants as a commercial enterprise? (2) What constitutes the "revenues and income" of the city for the year. And (3) What is an "indebtedness," in the meaning of section 157 of the Constitution? There are other and minor questions presented which will also be noticed.

Section 157 of the Constitution, in part, provides:

"No county, city, town, taxing district, or other municipality shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void. Nor shall such contract be enforceable by the person with whom made; nor shall such municipality ever be authorized to assume the same."

Public ownership of public utilities has been a political as well as a legal question for quite a while. It seems to have been a political question long before its legality was doubted. We read that Hezekiah, king of Judea, established and maintained by public authority a city waterworks plant in the city of David. 2 Kings, c. 20, verse 20. And who has not heard of the famous public baths of ancient Rome? The public lighting of the streets

of cities is of modern origin. Yet the necessity for lights in a city is scarcely less now than its necessity for water. Indeed, private wells and cisterns, and resort to natural streams by individuals for their necessary water, could as easily dispense with public waterworks, and more justly perhaps, than could private property owners light the adjacent streets and public places. It is found that light is not only essential to the safety of travelers to prevent their coming in contact with obstructions, but they perform a most valuable office in preventing crime. It is known that crime thrives best in darkness. A good light is the equivalent of a good policeman in preventing certain forms of crime. It is therefore universally held now that it is clearly within the police power of cities, even without express authority, to provide public lighting of their streets at the public expense. *Crawfordsville v. Braden,* 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214; *Mauldin v. City of Greenville,* 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291; *Ellinwood v. Reedsburg,* 91 Wis. 131, 64 N. W. 885; *Heilbron v. Cuthbert,* 96 Ga. 312, 23 S. E. 206. Where a city is given the power, either expressly or by necessary implication as an incident to its police power, to light its streets, and where the precise method is not expressly provided, it may either hire another to furnish the lights, or may furnish its own lights. The power to do the thing unreservedly gives the city the discretion in the choice of means it will adopt. *Mauldin v. City of Greenville,* 33 S. C. 1, 11 S. E. 434, 8 L. R. A. 291; Smith's Mun. Corp., § 881; *Henderson v. Young,* 119 Ky. 224, 83 S. W. 583; *Jacksonville Electric Light Co. v. Jacksonville,* 6 Am. Electl. Cas. 668, 36 Fla. 229, 18 So. 677, 30 L. R. A. 540, 51 Am. St. Rep. 24; *Smith v. City of Nashville,* 88 Tenn. 464, 12 S. W. 924, 7 L. R. A. 469; *Bridgeport v. Housatonic R. R. Co.,* 15 Conn. 475; *Crawfordsville v. Braden,* 130 Ind. 149, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214.

Cities of the fourth class of this State are granted power (section 3490, subsec. 10, Ky. St. 1903 [Carroll's ed.]):

"To provide for the lighting of the streets, market houses and other public buildings, rooms and offices, with gas, or in any other manner."

By an act approved March 24, 1894, which is an amendment to their charters (section 3580, Ky. St. 1903 [Carroll's ed.]),

cities of the fourth class are permitted to establish boards of public works. The section, however, concludes:

"Where no board of public works has been established, the duties herein imposed shall be performed by the council and such other employees and agents as said council may elect or designate."

By other sections of the act the authorities and powers of the board are declared. It is given especial control of the construction, repairing, and cleaning of streets, "and the lighting of all such public places as may be deemed necessary within the corporation." It is also given "exclusive control over such works as the city may own for supplying the city or the inhabitants thereof with water, light, heat or power, and shall have exclusive power to build, construct, equip, control, manage and operate any works the city may hereafter determine to own or construct for supplying the city or the inhabitants thereof with water, light, heat or power." These provisions are either an express grant of power to the cities (and we incline strongly to that view), or are a legislative construction of the extent of the powers already conferred in the general welfare clause (section 3490, subsec. 33, Ky. St. 1903), and in subsection 10, of section 3490, Ky. St. 1903, *supra*, the authority is here expressly conferred upon the council to contract for, and to construct and operate, a lighting plant to light the public streets and places, and to furnish lights to the inhabitants of the city. Whether a municipal corporation, an arm, as it were, of the State government, set up for governmental purposes only, ought to be privileged to engage in a purely commercial business, is a question of politics as well as, perhaps, of constitutional power. It involves the requiring of every citizen, who is a taxpayer, to contribute to the enterprise, to become a member of it in a sense, whether he wills to or not. Whether it is a governmental function to embark the public revenues in a commercial enterprise in order to cheapen a commodity of very common use, or which is even a necessity, may be a disputable question; but there is no doubt that the lighting of the public streets and places is a purely governmental matter. If the municipality may build and operate its own light plant for that purpose, and it may, it ought to be permitted to sell the surplus of its product as it would be to sell any of the horses bought for its fire department when they were no longer needed in the public service, or to sell any-

thing else it rightfully had, but had no further use for. So it is now held that they may sell such surplus property or products. *City of Henderson v. Young,* 119 Ky. 224, 83 S. W. 583; *Rogers v. City of Wickliffe,* 94 S. W. 24, 29 Ky. L. Rep. 587; *Pike's Peak Power Co. v. City of Colorado Springs,* 105 Fed. 1, 44 C. C. A. 333. It is true the courts generally rest their decisions as to the power of the municipality to produce and sell lights to its citizens as well as to furnish its own, upon the theory of the dual nature of a municipal government, in which it is part public and part private. This distinction, though, is rapidly disappearing, and exists now perhaps more as a fiction of the law than as a fact. Towns are now organized for governmental purposes only, no longer for the enjoyment of exceptional privileges granted as a favor by the sovereign. They levy taxes for governmental purposes, and can levy them for none other. Hence any expenditure of the public money must be in furtherance of a public benefit in its nature governmental. In this State a great many towns and cities own and operate their own light and water plants. In nearly every instance they furnish light and water to the inhabitants as well as to the public places. In no instance of which we are aware has it been held by any court, or allowed by an act of legislature, that a municipality could go into a commercial business purely as an enterprise of gain. It is always allowed or supported by the reason that it has the right to make or store the product for its public use. Common sense and good business allow that it should sell its surplus to its inhabitants, rather than to waste it. In this way it is enabled, too, to accomplish the main purpose, the public purpose, by enabling it to own and to economically operate a plant for that purpose. A city, doubtless, would not be allowed to act as a bond broker. Nevertheless, it may invest its sinking fund, which it is allowed and required to have in certain contingencies, in commercial bonds, and necessarily to sell them. Its prisoners may be required to work in its workhouse. May not the product of their labor be sold? The situations all seem to us to be analogous. The main feature in each is a clearly governmental power and duty. The other or added feature is incidental, and allowed as a sensible and necessary concomitant of the main purpose. We think the city had the power to install a light plant to furnish public lighting, and incidentally, as is proposed, light to its inhabitants.

The city of Madisonville, at the beginning of the year 1906, was not only out of debt, but had $8,000 in cash on hand. The assessed value of property for taxation was about $1,500,000. Under the Constitution, the city was authorized to levy a tax of 75 cents on the $100 taxable property. Thus its revenues from the source of property tax alone was $11,250. It had about 900 poles from which $1,350 could have been realized. The only legal liability which the city incurred in May of 1906, on account of the electric light plant, was for the poles, $1,200. The contract for the machinery, amounting to $9,892, was not closed until July of 1906. In the meantime the city had collected of delinquent taxes from former years, and in license taxes, fines, and from miscellaneous sources, a sum largely in excess of the above-named liability of about $11,000, created on account of the light plant. And in September, 1906, when the city closed the contract for the incandescent wire system, and for building machinery foundation, amounting to some $7,928, it had collected from the sources above named, including ad valorem taxes, poll taxes, and cash on hand at the beginning of the year, about $600 more than the total of the light plant liability so far contracted, and over and above all its ordinary running expenses. By January 1, 1907, it had paid out of the income and revenues of 1906 all its current expenses and all the cost so far incurred in building the plant, and had considerable money left in the treasury. With this, and by anticipating the revenues of 1907, it in January, 1907, contracted for the remainder of line (about $7,500) known as the "Arc Line." In this way the city has contracted no debt beyond its current revenues. It agreed to pay cash, and has paid cash for all it bought. It accomplished this by not buying more than it had the means on hand, or certainly then due it, to pay for. The city had the right to apply the $8,000 on hand January 1, 1906, to any governmental purpose. It appears to have been a general accumulation in the city treasury — doubtless from license taxes, fines, and the like. This surplus was available for any proper purpose for which taxes might have been levied. *Field v. Stroube*, 103 Ky. 114, 44 S. W. 363; *Wathen v. Young*, 103 Ky. 36, 44 S. W. 115; *Whaley v. Commonwealth*, 110 Ky. 154, 61 S. W. 35. The "income and revenues" of the city for the year 1906 included delinquent taxes of previous years which were collectible.

Graham v. Spokane, 19 Wash. 447, 53 Pac. 714; *French v. Burlington*, 42 Ia. 614. There was also included, not only the levy that was actually made for 1906, but such as could have been legally made, for the purpose of testing the binding obligation of the city's contracts incurred during the year. *City of Providence v. Providence Light Co.*, 91 S. W. 664, 28 Ky. L. Rep. 1015.

It may be conceded, for the purpose of this decision, that fines and license fees were too uncertain and indefinite to be estimated in the beginning of the year, as part of the income of that year. If they were so treated, we easily see how a city might inadvertently, or by clever design, exceed the constitutional limit by overestimating these sources of revenue, though based upon the experience of previous years. For, unlike taxes, their collection depends upon whether the licensees elect to take out the licenses, and whether the fines are assessed and paid. The result would be a debt without wherewith to pay it, and without the consent of the requisite voting taxpayers. Such items *in futuro* have been held not properly estimable. *Rice v. Milwaukee*, 100 Wis. 516, 76 N. W. 341. But, where the licenses are paid, and the fines assessed and collected, the uncertainty which was the sole obstacle to carrying them into the estimate of the city's income for the year has been eliminated. They are then as available as any other cash on hand for the purpose of buying machinery for a light plant, and may be so applied by the city. If the contract was made before the license fees and fines were collected, its validity might ultimately depend upon whether they are in fact collected. But all these doubts are removed by their collection before the liability was incurred. It is scarcely necessary to here enter upon a discussion of what an indebtedness is, under section 157 of the Constitution. It is enough to say that it is a liability voluntarily incurred by the city by express contract, and which it is bound to pay in money. Still, in estimating a city's liabilities as compared with its cash and income, it is proper to consider, in addition, those known and fixed liabilities, such as official salaries and the like, as the government must be maintained. *Troutman v. Hays* (decided May 3, 1907), 101 S. W. 976, 30 Ky. L. Rep. —.

Appellant contends that the city could not legally contract for a light plant in piecemeal. The reason assigned is that no part of

it is valuable as a public utility till all of it is assembled. The reason is not satisfying. If the plant was not run after it was bought, it would equally fail to meet the public requirement. Yet that fact ought not to avoid an otherwise perfectly valid contract for its construction. In the matter of buying and installing such plant, the city is left wholly to the judgment of its council as to the kind, the cost, when and where it shall buy, and how much at a time. There is only one limitation upon the city; that is, it shall not become indebted beyond the income and revenues of the year without the assent of two-thirds of the voters voting on the question. The Constitution did not design an interference with a free exercise of a city's judgment as to its expenditures for public purposes, provided it had the means at hand to pay for them. It did not discourage cash payments, but rather encourages them. The course of appellee city in buying only what it could pay for, and as it could pay for it, is one that might be more frequently followed with satisfactory results to taxpayers.

Another complaint is that the city, in order to buy its light plant, neglected to repair its streets, and neglected other governmental duties. There is no evidence in the record to this effect; but, if the charge were sustained, we do not see how that could vitiate its contracts with those who sold it the machinery and other equipment for the light plant. After all, the city council is to judge what public improvements are most needed by the city, and, if all that it needs cannot be got at once, to select that which is the most urgent. If any discretion is to be left in the city council, it is as to such matters. Whether it has criminally neglected its streets, so as to render the city or the members of its council liable to a penal prosecution therefor, is not shown, and, if it was, has no place in this litigation.

A still further objection is that the city does not own the lot or building in which the machinery is placed. The record does not show the arrangement between the city and the lot owner, whether it is by lease with option to buy, or how that is. A lease for one year, with an option to the city to continue it from year to year, or to buy it at a fixed price, would not be repugnant to the Constitution as incurring a liability beyond the revenues of the year. The lease at $400 (which is the sum intimated in the record as being the rental) would not, when added to the other

items examined and discussed, exceed the city's revenues for the year. Such a lease would be sufficient consideration to support the options named; but the city would not be bound on the options until it accepted them. As there is nothing showing that the city has violated the Constitution by incurring a debt beyond the constitutional limitation, we cannot control the discretion of the council in bargaining for its lot, and making such terms therefor as suit it, and as are not unlawful.

The city has six councilmen. One had vacated his office, and two resigned. Thus, there were three vacancies. The three remaining councilmen filled one of the vacancies by their appointment. The four sitting as a city council filled the other by their appointment. The statutes provide for the filling of vacancies in the office of councilmen of cities of the fourth class by appointment by the council. Section 3552, Ky. St. 1903. A majority of the members constitute a quorum, with power to act. Section 3486, Id. We are not now prepared to say whether this method was the proper one for filling the vacancies under the circumstances. Nor do we find it necessary to decide the question. The appointees qualified and acted, and were *de facto* officers, whose acts, in any event, are binding upon the public.

Perceiving no error in the record, the judgment is affirmed.

McILLHINNY v. VILLAGE OF TRENTON.

Michigan Supreme Court — May 18, 1907.

148 Mich. 380, 111 N. W. 1083.

USE OF STREETS — NUISANCE — ERECTION OF ELECTRIC LIGHTING PLANT — INJUNCTION. — A village has no right to erect an electric lighting plant in the center of a public street to the annoyance and injury of abutting owners, and an injunction should be granted restraining such improper use of the streets.

Appeal by complainant from a decree giving insufficient relief. *Reversed.*

Before GRANT, BLAIR, MONTGOMERY, HOOKER, and MOORE, JJ.

Nuisance. — See *Ganster v. Met. Electric Co., ante,* and note thereunder.

Lodge, Trevor & Brown, for appellant.

Dickinson, Stevenson, Cullen, Warren & Butzel (*Charles W. Casgrain* and *Joseph S. McDowell*, of counsel), for appellee.

Opinion by MOORE, J.:

Appellant is the owner of a residence property situated on the northeast corner of Front street and St. Joseph avenue, in the village of Trenton.

The dedication clause in the plat contained the following language:

"To vest the fee of such parcels of land as are herein named, or intended to be for public use, in said county, in trust, and for the purposes and uses therein named, expressed or intended, and for no other use or purpose whatever."

Complainant is the owner of lots 97, 98, 119, 120, situated on the northeast corner of Front street and St. Joseph avenue, her property having a frontage of 132 feet on Front street and running back parallel with and alongside of St. Joseph avenue to the channel bank of the Detroit river, a distance of from 350 to 500 feet. On or about May 22, 1896, the village council and water commissioners caused to be erected in the center of St. Joseph avenue, south of Front street, and between 100 and 150 feet from the channel bank of the river, a building thirty feet wide east and west by thirty-two feet long north and south, which has since been used for a pumping station in connection with the village waterworks. No legal proceedings were taken by complainant, or in her behalf, to restrain or enjoin the erection of this plant. Since the erection and operation of this pumping station complainant and other residents in that neighborhood claim to have suffered great inconvenience and annoyance from the large volumes of smoke and soot emitted from its smokestack, and the noises of a large steam whistle blown each day. On the 12th of November, 1902, the defendant awarded a contract for the erection of, and afterwards proceeded to erect, a frame building with a stone foundation (a duplicate of the then existing pumping station) in St. Joseph avenue, immediately adjoining the pumping station on the north, and between the pumping station and complainant's property. This building, when completed, was to be 12 feet high, 32 feet long north and south, and 30 feet east and west, parallel with

complainant's lot line, and leaving between one-half to two and one-half feet between the building and complainant's south fence. This building was to be used for the installation and operation of an electric lighting plant. Complainant thereupon filed her bill of complaint to enjoin such proposed erection, claiming that the village had no right to use the street in such a manner, and praying that defendant be compelled to remove, not only that portion of the new structure which had already been put in, but also the pumping station. The trial court held that although the pumping station might have been regarded as a nuisance in its inception, and if application had been made in due season to enjoin it he would have enjoined the original erection, nevertheless the complainant, having allowed so long a time to elapse, is not entitled to an injunction entirely prohibiting the erection of the building. He ordered the smoke and noise nuisance to be abated; and, while he enjoined the erection of the building next to complainant's property where it was originally proposed to build it, he permitted it to be erected on the eastern, or river, side of the pumping station, still occupying as great an additional part of the street as first planned. The case is brought here by appeal. Counsel do not ask to have the decree refusing to enjoin the village from operating its pumping station reversed, but ask this court to grant an injunction against the new obstruction in the street.

The following statements of the law have been made: "Municipal corporations, notwithstanding their broad and comprehensive powers, have no right, unless authorized by the legislature, to alienate their streets or devote them to the uses inconsistent with the rights of the general public and the abutting land owners." 24 Am. & Eng. Enc. of Law (1st ed.), p. 47, and cases cited. "Whether the fee of the street or a mere easement is vested in the municipality, it holds it in trust for the public for the ordinary and necessary purposes to which the streets of a city are usually subjected." 27 Am. & Eng. Enc. of Law (2d ed.), 149 and cases cited. "The municipality holds the streets and power to regulate and control them in trust for the public, and cannot put them to any use inconsistent with street purposes. Thus cities have no right to use their streets for the erection of municipal buildings or works, and it has been held that placing of a stand pipe in a public street, the fee of which was in the municipality,

was an unlawful use of the street." 27 Am. & Eng. Enc. of (2d ed.), 150, and cases cited. See also *Barrows v. Sycam* 150 Ill. 588, 37 N. E. 1096, 25 L. R. A. 535, 41 Am. St. 400; *Davis v. Appleton,* 109 Wis. 580, 85 N. W. 515; *Pett Grand Junction,* 119 Ia. 352, 93 N. W. 381; *Savannah v. Wi* 49 Ga. 476; *Rutherford v. Taylor,* 38 Mo. 315; *Glasgow v Louis,* 87 Mo. 678. The village had no right to make the use o street it attempted to do. Since this bill was filed, the villag ignored the effort of complainant to assert her rights, and completed the building, and we are now urged to affirm the d of the court below. The action of the village was taken a peril, and it should not be permitted to profit by its own wron

The decree is reversed, and one will be entered here requi the removal of the electric lighting plant, with costs of both co

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STATE EX REL. PEOPLE'S LAND & MFG. CO. v. HOLT, MA ETC., ET AL.

Wisconsin Supreme Court — May 21, 1907.

132 Wis. 131, 111 N. W. 1106.

MANDAMUS — CONTRACTS FOR ELECTRIC LIGHTING — LOWEST BIDDER. an application for mandamus to compel the award of a contra electric lighting to the relator, as the lowest bidder, it appeared the city charter provided that "all the work for the city * * * be let by contract to the lowest reasonable, responsible bidder." that in deciding questions as to street lighting the common counci within its legislative function where courts neither will nor can or control it, and that the city was not bound to let the contr the lowest bidder, the taking of bids may have been merely to a information.

Appeal by relator from a judgment quashing an alternative of mandamus and dismissing the proceedings. *Affirmed.*

Contracts for Electric Lighting — Lowest Bidder. — In the al of a statute a municipality is not obliged to accept the lowest bid for el lighting (*Santa Rosa Lighting Co. v. Woodward,* 119 Cal. 30, 50 Pac. 1 and may award contracts therefor independently of the bids received if to the best interests of the municipality. *Oakley v. Atlantic City* (N. J. Ct.), 44 Atl. 651.

In California, under the Constitution, it is held that there shall 1 restriction upon competition for such contracts. *Pereria v. Wallace,* 12 397, 62 Pac. 61.

Statement of facts by DODGE, J.:

Application for mandamus to command the respondents, as mayor and aldermen of the city of Oconto, that they award contract for electric lights and lighting to the relator according to the terms of notice for bids and the bid of the relator as submitted at a council meeting held May 1, 1906. The application asserted that the city of Oconto exists under a special charter (chapter 56 of the Laws of 1882); that the respondent Holt is mayor and the other respondents are the aldermen of said city; that in December, 1905, a former contract, originally made with W. A. Holt, present mayor, but afterwards assigned to W. A. Young, for the supply of certain arc lights for street lighting and certain other lighting for public buildings, being about to expire, a resolution was adopted that the mayor and clerk advertise for bids for furnishing fifty arc lights, more or less, whereupon notice was published and two bids received, one from said Young and the other from the relator, differing somewhat in terms, but the former making a price of $75 and the latter of $50 for arc lights. On January 2, 1906, the council voted to reject all bids and readvertise upon slightly more specification. Readvertisement was made and bids again presented by the same parties, the relator bidding $55 as against $60 by its competitor. The council voted to accept the relator's bid, which resolution was vetoed by the mayor for reasons stated, such as the necessity of a bond and inadequate description of the lights to be furnished. Whereupon it was again resolved to advertise for bids embodying further specifications and meeting the grounds of objection raised by the mayor in his veto. To this only Mr. Young's company responded with a bid, which on April 3d was rejected, with directions to the clerk to readvertise. Whereupon another advertisement was made, reserving the right to reject any and all bids, and on May 1st bids were submitted by Mr. Young's company and by the relator, differing somewhat in details and description of services to be performed, but the former naming $60 as the price for arc lights and the latter $50. Motion to accept relator's bid was amended into a resolution to reject all bids and readvertise, and, as so amended, was adopted by a vote of six aldermen each way, the mayor voting in the affirmative. The relator made some attempt to allege that the mayor, Holt, directly or indirectly, derived some financial benefit from Mr. Young's company; that some of the aldermen were actuated by ill-will towards officers of the relator's company, and wilfully, arbitrarily, and without reasonable cause repeatedly rejected all bids without assigning any cause therefor. It is also made to appear that the charter contains a provision: "All work for the city or either ward thereof * * * shall be let by contract to the lowest, reasonable, responsible bidder." No statement as to relator's responsibility or ability to perform the contract is made, except that it possesses a franchise to furnish electric lighting. Alternative writ being issued, a motion to quash was made, which motion was granted on grounds of general insufficiency to entitle the relator to the relief, and, relator having announced that it did not desire to amend, the proceedings were dismissed with costs in favor of the respondents, from which judgment or order relator appeals.

V. J. O'Kelliher, for appellant.

P. H. Lynch, City Atty. (*A. V. Classon* and *Greene, Fairchild, North & Parker,* of counsel), for respondents.

Opinion by DODGE, J.:

Of course, the relator has no contract right resulting fro tendering bid in response to notice expressly reserving right ject any or all bids. 1 Page, Contr., § 26; *Topping v. Swor* E. D. Smith, 609; *Howard v. Maine Indust. School,* 78 Me. 3 Atl. 657; *Leskie v. Hazeltine,* 155 Pa. 98, 25 Atl. 886; *A son v. Board,* 122 Mo. 62, 27 S. W. 610, 26 L. R. A. 707. Her the recipient of the bids were a private individual, any attem predicate rights upon such transaction must fail. Relator tends, however, that a clear public duty is imposed by law the respondents to enter into contract with the lowest bidder, therefore mandamus should issue to compel such action. T is much authority against the right of a mere bidder to invoke remedy, since the respondents' duty imposed by law, whatev is, is so imposed for the welfare of the public, and not for tection of the would-be contractor. *State ex rel. Phelan v. B* 24 Wis. 683; *People v. Board,* 27 N. Y. 378, 382. Passing question, however, is there any clear public duty whatever posed by law upon the common council to enter into a contrac street lighting with the relator? The only provision suggest that "all work for the city * * * shall be let by contra the lowest reasonable, responsible bidder." Section 1, subc. c. 56, p. 254, Laws 1882. But this is contained in a ch which confers upon the common council all the usual auth and duty to consider and control questions of policy in muni affairs. Among these questions is that of street lighting; whe the streets shall be lighted at all; what expense can properl incurred for such purpose; what means shall be employed; whe desired results can best be accomplished by contract or by mu pal agency, and many other details. In considering and deci such subjects, the common council is within its legislative fun where courts neither will nor can guide or control it. *Stat rel. Rose v. Superior Court,* 105 Wis. 651, 81 N. W. 1046, 4 R. A. 819; *State v. Frost,* 113 Wis. 623, 655, 88 N. W. 912 N. W. 915; *Madden v. Kinney,* 116 Wis. 561, 569, 93 N. 535; *Tilley v. Mitchell,* 121 Wis. 1, 10, 98 N. W. 969, 105 St. Rep. 1016; *Harley v. Lindeman* (Wis.), 109 N. W. *People v. Board,* 49 Barb. 259; *Grant v. Common Council* Mich. 274, 91 N. W. 997. So far as appears by the relation,

of these questions of policy have yet been decided. The taking of bids upon any one of several plans may well be merely to acquire information as to feasibility or cost of that plan as a basis for intelligent decision whether that or some other is most for the public good. The council, having ascertained the price at which they can obtain arc lights by contract, owes to the public the duty to consider whether some other type of lights or of illumination may not be for public benefit; also whether the city might not better install its own lighting plant. If the present application for imperative mandamus were granted, all these questions of policy, for three years at least, would be foreclosed. The court would have decided upon that which the Constitution places within control of the legislature. This we cannot do, nor can we inquire into the motives which actuate legislators in the performance of their functions as such.

For these reasons there is obviously as yet no clear duty imposed upon the council by law to make contract at all, hence, of course, none to enter into one with the relator, however obvious the want of authority to contract with any other bidder.

Judgment affirmed.

SAN ANTONIO GAS & ELECTRIC CO. v. BADDERS ET AL.

Texas Court of Civil Appeals — May 22, 1907.

46 Tex. Civ. App. 559, 103 S. W. 229.

1. DEATH FROM CONTACT WITH UNINSULATED WIRE — LIABILITY OF COMPANY UNDER STATUTE. — An electric company is liable for the death of person from contact with an uninsulated wire under a statute providing that actions for actual damage on account of injuries causing the death of any person may be brought when the death is caused by the wrongful act, negligence, unskillfulness, or default of another.

Violation of Ordinance As Evidence of Negligence. — Violation of a city ordinance by connecting electric light wires without permission of the inspector is evidence of negligence. And where a person wires a building in violation of a city ordinance he cannot recover from an electric light company for shock from an incandescent light, if the violation of the ordinance contributed to the accident. *Brunelle v. Lowell Electric Light Co., ante*, 74 N. E. 676. Violation of an ordinance, regulating the erection and protection of wires by an electric company, is *prima facie* evidence of negligence. *Commonwealth Electric Co. v. Rose, ante*, 214 Ill. 545, 73 N. E. 780. Thus, the failure

2. INSULATION — DUTY OF ELECTRIC COMPANY. — It is the duty of an electric company to have its wires, to which the public, or persons whose duties call them in proximity thereto, will be exposed, insulated.
3. SAME — NEGLIGENCE. — Where the defective and dangerous condition of an electric company's wires, at a place where employees of a telephone company would in the course of their work be called, continued for months, and until an employee of the telephone company met his death therefrom, and this dangerous condition was due to the failure of the electric company's employees failing to finish their work, the electric company was negligent.
4. FAILURE TO COMPLY WITH ORDINANCE — NEGLIGENCE PER SE. — Where an electric company failed to properly insulate its wires, as required by a city ordinance, it was guilty of negligence *per se*.
5. INSTRUCTIONS. — In an action against an electric company and a telephone company for injuries sustained by an employee of the latter company, an instruction which simply told the jury that, as between the defendants, one was responsible to the other, in case plaintiff was allowed a recovery against both, was not misleading.

Appeal by defendant gas and electric company from a judgment in favor of plaintiff. *Affirmed.*

Ogden, Brooks & Napier, for appellant.

H. C. Carter and *Perry J. Lewis,* for appellee.

Opinion by JAMES, C. J.:

Minnie Lee Badders, the widow of Earnest N. Badders, for herself and as next friend of their children, brought this suit against appellants, the San Antonio Gas & Electric Company and the Southwestern Telegraph & Telephone Company, for damages for the killing of Earnest N. Badders, a telephone inspector, in the employ of the latter company, on or about June 5, 1905. The petition alleged his duty to ascend one of the poles for the purpose of loosening and uncrossing wires, and while so engaged, in order to reach the telephone company's wires, he passed in close proximity to, or came in contact with, the wires of the said gas and

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of a telephone company and a street railway company to comply with a city ordinance, prescribing the respective location of their wires, is *prima facie* evidence of negligence. *Southwestern Telegraph & Telephone Co. v. Myane.* 111 S. W. 987. As to the failure of an electric light company to comply with an ordinance as to the stringing of its wires, see *Stark v. Muskegon Traction & Lighting Co., ante,* 12 Detroit Legal News 550, 104 N. W. 1100. The failure of an electric company to comply with a city ordinance as to the maintenance of its wires does not render it liable for the death of a trespasser. *Burnett v. Ft. Worth L. & P. Co.,* 117 S. W. 175.

electric company, which were stretched on the sides of the said pole of the telephone company. The said gas and electric company's wires conducted a powerful, dangerous, and deadly current of electricty of about 2,200 volts, and they were strung alongside the pole of the telephone company several feet under its wires, and in such manner and proximity that a person ascending the pole had to come in close proximity or in contact with them, and at a point near the pole the electric light wires were uninsulated and wholly uncovered, so that the current would pass to the body of one climbing the pole. That the said gas and electric company was negligent in having and permitting the wires to be placed and maintained in such position uninsulated. That the telephone company was negligent in having and permitting the electric company to have and maintain its wires along its pole, and in permitting same to be uninsulated. That, while ascending said pole to attend to the telephone wires, the said Badders, without knowledge or notice of the danger so created, came in close proximity to, and in contact with, said wires, and received the shock which caused his death. The petition further alleged that there was in force a city ordinance regulating and governing the construction and maintenance of wires for conducting electricity, which enacted, in substance, that live wires must have an approved weather or rubber insulating covering, and be so spliced or joined as to be both mechanically and electrically secure without solder, and the joints must then be soldered to insure preservation, and covered with an insulation equal to that of the conductors; and that wires must be so placed that moisture cannot form a cross-connection between them, not less than a foot apart, and not in contact with any substance other than their insulating supports. And it was alleged that a violation of this ordinance was made a misdemeanor and punishable. The petition alleged the violation of the ordinance, in that the wires did not have an approved weather or rubber insulating covering, and at a point near the pole did not have any covering or insulation at all; that said wires were not placed more than a foot apart, etc. The gas and electric company pleaded general denial; also, that deceased came to his death by an accidental fall; also, through his contributory negligence; also, that it occurred from the negligence of the telephone company in permitting its pole to lean over, instead of being kept in a perpen-

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undisputed evidence shows that the
insulated by its linemen Kuhlmann

phone pole, close to the pole, and both were uninsulated eight to ten inches from the pole. The bare and uninsulated places were from eight to ten inches in length. These wires were highly charged, and deceased, an employee of the telephone company, while ascending the pole in the performance of his duties, came in contact with said exposed parts, and was killed. It also appears that from six to ten weeks previous these wires had burnt out by coming in contact with the pole, and a man sent to make temporary repairs, who got them so they would run that night and left an order for the lineman to fix them permanently. The next day Kuhlmann and Henry, linemen, were sent to do this work. Kuhlmann testified:

"We found them in bad condition, with a lot of slack in them, seems where some one had been up there and fixed them temporarily. We pieced them out and transferred them around the guy that was holding the telephone pole. I got on the telephone pole and pieced them out, and Mr. Henry drew them over to the gas and electric company's pole, and tied them on there, and intended to solder and fix them up — these joints — about fourteen or sixteen inches away from the telephone pole, on the north side; but it had been raining. That is why we left them to be taped, soldered, and insulated at some future date, and we just neglected it, that is all," etc.

Henry testified that they did not solder or tape the joints, and did not go back there afterwards, just neglected it. Kuhlmann had the order, marked it "O. K.," and turned it in. Kuhlmann testified he didn't know that the company had any one to look after things of that kind and see that high voltage wires are not left exposed. Henry testified that he never told the line foreman about it; that it was his duty to see that it was properly done; that his orders were carried out, but he was not with them at the time. The foreman testified that he sent out the linemen to do this work, but did not know how they had done it until after the death of Badders. He stated also that he went to the scene of the accident the next morning, and from his buggy saw but two uninsulated joints just north of the telephone pole. As Kuhlmann and Henry stated they left four joints, two north of the telephone pole and two near the gas company's pole, appellee states it as a fair inference that those at the gas company's pole had been in the meantime insulated. The defendant's superintendent testified that the foreman would give the linemen a card indicating the work to be done; that he did not inspect the work to see that it was properly done, and did not know any further about the work, ex-

cept what the card told him; that the foreman owed no duty to that the work was properly done, and did not go around after men to see that it was properly done. The ordinance of the c as set forth in the petition was established.

The above forms substantially the testimony upon which pellant contends that there was no negligence or default of app lant itself; in other words, that the act which caused this de was solely the act of its employees, for which it is not made sponsible by article 3017, Rev. St. 1895. We are of opinion t the claim is not well founded. The second clause of said arti provides that actions for actual damage on account of injur causing the death of any person may be brought when the de is caused by the wrongful act, negligence, unskillfulness, or fault of another. This reaches all persons and private corpo tions. It was a duty imposed by law upon appellant to have wires to which the public, or persons whose duties called them proximity to them, would be exposed, insulated. This was h in *Standard Light & Power Company v. Muncey,* 8 Am. Ele Cas. 714, 33 Tex. Civ. App. 416, 76 S. W. 931, in a case wh there was no statute nor ordinance expressly imposing the du The duty was held to be one which the company could not div itself of. To the same effect is *Citizens' Tel. Co. v. Thomas* Am. Electl. Cas. 950, 99 S. W. 879, 17 Tex. Ct. Rep. 532. both cases the Supreme Court refused a writ of error. The timony here was amply sufficient to establish negligence or defa of appellant in respect to its duty to have its wires insulated. Joyce on Electric Law, § 445, it is stated that "a company ma taining electrical wires, over which a high voltage of electric is conveyed, rendering them highly dangerous to others, is un the duty of using the necessary care and prudence at places wh others may have the right to go, either for work, business, pleasure, to prevent injury. It is the duty of the company, un such conditions, to keep the wires perfectly insulated, and it m exercise the utmost care to maintain them in this condition at s places." But applying the test of ordinary care, the evide here is sufficient. The defective and dangerous condition of wires in question, at a place where employees of the teleph company would in the course of their work be called, contin for months, and until Badders met his death. Appellant says it had sent out competent linemen to repair the wires and

them in proper condition, including insulation, and these men reported the work done; that it had no notice to the contrary until Badders was killed; and that in this it exercised all the care that was required of it. The contention of appellant might be sound, if, while the linemen were engaged in repairing the wires, some act of theirs had caused the death of a person; but they were not working with the wires when Badders was killed. Their work was ended, and it was the condition in which they left the wires, and the allowing of them to remain in that condition, which was the cause of his death. If the duty was imposed on the company to exercise ordinary care with respect to maintaining its said dangerous wires in a safe condition, it was not error of which appellant can complain, for the court to submit to the jury the question of its negligence in permitting such conditions to exist for so long a time, relying altogether on the report of its employees. It would be a proper consideration whether or not some inspection from time to time of its lines (which in this instance was not attempted) was called for in the exercise of the proper care in the discharge of this character of duty. Certainly a delay of so long a time in discovering and remedying such conditions of its wires would indicate negligence or default. The failure of appellant to have the wires insulated was, by reason of the ordinance, negligence *per se*. The duty of their proper maintenance was expressly imposed on appellant, and we hold, in accordance with the cases above cited, that the fact that the dangerous condition of the wires was due to its employees failing to finish their work, and leaving it in a dangerous condition, does not detract from its character as the act or omission of appellant itself.

The third assignment complains of the refusal of this instruction:

"You are instructed that the defendant the San Antonio Gas and Electric Company is not responsible to plaintiffs for the negligence, if any, of its servants Kuhlmann and Henry, or either of them, in leaving the joints on its wires, just north of the telephone pole, bare and uninsulated at the time they repaired the same, and in arriving at your verdict you will not consider the said act of said servants, or either of them, in leaving said joints bare and uninsulated at the time they repaired the same."

What has been said is against the propriety of this charge. It would virtually have given the jury to understand that appellant was not responsible, in this case, for allowing the wires to remain in the condition they were left in by Kuhlmann and Henry.

The fourth assignment complains of this paragraph of the charge:

"In the event you should find in favor of the plaintiffs against both the defendants, then I charge that you find a verdict in favor of the Southwestern Telegraph and Telephone Company for the amount that you find in favor of the plaintiffs against the defendants."

As the jury found only against the gas and electric company, the only proposition that could avail appellant anything is that by this charge the judge told the jury that in his opinion the gas and electric company was at fault, and was the active wrongdoer, and was therefore calculated to influence the jury to render a verdict against appellant. The charge simply told the jury that, as between the defendants, one was responsible to the other, in case plaintiff was allowed a recovery against both. The charge had no reference to any finding as between plaintiff and defendants, and that matter was left entirely to the jury. No jury of common understanding could have been misled as the proposition charges. We take occasion to state here that the assignment of error refers to said charge as one requested by defendant. This does not appear to have been so from the record, and counsel for both parties have filed with us an agreement showing such reference to have occurred through inadvertence in the preparation of the assignment, and we have so dealt with it.

The sixth and seventh assignments go to the overruling of the motion for new trial because the verdict was contrary to the law and evidence, in that there was no evidence to show that appellant

CROUCH v. CITY OF MCKINNEY.

Texas Court of Civil Appeals — June 15, 1907.

104 S. W. 518.

1. MAINTENANCE OF ELECTRIC PLANT BY CITY — SALE OF SULPHUS POWER. — A city maintaining an electric plant pursuant to statute, may sell the surplus power to private citizens after discharging its duty to the public.
2. SAME — INJUNCTION. — An injunction will not be granted restraining a city maintaining an electric plant from selling the surplus power to private citizens, where it appears that the city has lighted the streets to the best of its ability.
3. FRANCHISES. — A city has no power to grant an exclusive franchise for the lighting of its streets.

Appeal by plaintiffs and an intervener from a judgment for defendant. *Affirmed.*

M. H. Garnett, G. R. Smith, and *Abernathy & Abernathy,* for appellants.

I. E. Reeves and *Abernathy & Mangum,* for appellee.

Opinion by RAINEY, C. J.:

This suit was instituted by J. P. Crouch and J. P. Burrus to enjoin the city of McKinney and its officers to restrain the said

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Exclusive Franchises. — The rule is well settled that a municipal corporation, in the absence of statutory authority, cannot grant to a private corporation the exclusive right to use its streets for the purpose of supplying electric light. But an ordinance which merely permits an electric company to use the streets, without granting an exclusive privilege, is valid. *Crowder v. Town of Sullivan,* 3 Am. Electl. Cas. 72, 128 Ind. 486. Although an ordinance granting a franchise to an electric light company declares it to be "permanent and perpetual," this does not invalidate the entire ordinance. *Levis v. City of Newton* and *Newton Electic Co.,* 6 Am. Electl. Cas. 13.

A grant by the legislature of exclusive privileges to a corporation should be construed strictly against the corporation. Thus, a statute relative to "companies for the manufacture of gas, or the supply of light or heat to the public by any other means" does not embrace electric lighting. *Scranton Electric Light & Heat Co. v. Scranton Illuminating, Heat & Power Co.,* 3 Am. Electl. Cas. 499, 122 Pa. 164. In the case of *Grand Rapids Electric Light & Power Co. v. Grand Rapids Edison Electric Light & Fuel Gas Co.,* 2 Am. Electl. Cas. 152, 33 Fed. 659, it was held that there was no power, express or implied in the common council of a certain city to grant to one electric light company the exclusive privilege of using the streets of said city for the maintenance of its lines.

See also 8 Am. Electl. Cas. 64–80, and note, and *Water, Light & Gas Co. v. City Hutchinson et al., ante.*

city from furnishing electric lights to private citizens to be use in their private and business houses. It was alleged that th furnishing of said light to individuals would decrease the efficienc and effectiveness of the street lights already established and pr vent the establishment of other street lights needed by the city also, that it was in contravention of the constitution of the Stat and the charter under which said city is operating; also, that i was diverting the revenues of the water plant to the operation c the electric plant, thereby using money procured by taxation for purpose not authorized, when said revenues should be applied t the betterment of said water system; also, that the city is furnis ing said lights to individuals at less than the cost of productio and to maintain the said incandescent system will necessitate lar expenditure of money that can be derived only from taxatio which will not be used for public purposes, but for private ga alone. A temporary injunction was granted, and the defendan answered and filed a motion to dissolve. The McKinney Electr Light & Motor Power Company filed a plea of intervention, which defendants filed an answer. The motion to dissolve w presented to the judge in vacation, and the same was sustaine and plaintiff and interveners excepted. Thereafter motion w made to the court to reinstate, and plaintiff and interveners b leave of court filed their first supplemental petition. The exce tions of plaintiff and interveners were overruled, and they du excepted, and the cause was continued without prejudice. At th September term following, the motion to reinstate was overrule to which exceptions were duly taken. The case was tried before jury, and verdict and judgment were rendered for defendants, an plaintiff and interveners appeal.

The first and second assignments of error complain of the actio of the court in overruling the motion to reinstate the injunctio On the hearing of the motion to reinstate no statement of the ev dence is embodied, if any was adduced, or incorporated in th record, and, as the case was tried on its merits, we will only co sider the case from the evidence and proceedings on the trial i determining whether there was error committed. The city of M Kinney is operated under the general laws of the State inco porating cities and towns. Article 421, Rev. St. 1895, reads:

"To provide for lighting the streets and erecting lamp posts therein, a regulating thereof, and from time to time create, alter, or extend lamp di

tricts, to exclusively regulate, direct, and control the laying and repairing of the gas pipes and gas fixtures in the streets, alleys, sidewalks, and elsewhere."

The city established an electric light plant in connection with its water plant and installed thirty-one arc lights in different parts of the city. It granted to certain corporations a franchise to install an electric light plant to furnish the citizens lights for their private and business houses. This franchise is now held by intervener the McKinney Electric Light & Motor Power Company. It is conceded by appellants that the city had the power to install the electric light plant for the purpose of lighting the streets, but that its power ceased there, and that it has not the power to furnish electric power to individuals for lighting private and business houses, until all portions of the city are furnished street lights. There are some portions of the city that are not supplied with street lights, but this condition exists for the want of funds to install them. The people of the city voted the issuance of bonds for installing the electric light plant. The proceeds of the sale of said bonds were exhausted in installing said plant and the thirty-one arc street lights, and no funds remain for the extension of the street lights. The capacity of the electric plant is much greater than necessary for the lighting of the streets, and the excess or surplus is used by the city in supplying lights to individuals for their private use. When the city has a surplus of power, after discharging its duty to the public, there seems to be no question of its authority to sell the excess to private citizens. *Nalle v. City of Austin* (Tex. Civ. App.), 21 S. W. 380; *City of St. Louis v. The Maggie P.* (C. C.), 25 Fed. 204; Joyce on Electric Law, § 237; *Power Co. v. City of Colorado Springs,* 105 Fed. 1, 44 C. C. A. 333. But it is contended that as long as portions of the city remained unlighted there could be no excess of electricity that could be disposed of by the city. This contention we do not think tenable. The government of the city has been instructed to a mayor and board of aldermen, and, so long as the affairs of the city are conducted in a reasonably judicial manner, their acts will not be interfered with. No fraud is alleged on the part of council in conducting the city government, and, "unless the council is transcending its powers, or some clear right has been withheld, or wrong perpetrated or threatened," the parties are not entitled to invoke the power of the court. 1 Dillon, Mun. Cor.

(4th Ed.), § 95. All the proceeds derived from the sale of electric light bonds had been consumed in the installation of plant and street lights. The council had used their discretion placing the lights for the streets, and it was not practicable extend them to other parts of the city. Under these conditi rather than to have let the surplus power of the plant remain i it was better to sell such surplus of the electricity that was p duced for private use.

The appellant complains of the third paragraph of the cou charge, which reads as follows:

"(3) If, therefore, you believe from the evidence that the said electric l plant owned and operated by the city has no more power than is neces to furnish a sufficient number of arc lights for the reasonable lighting of city's streets, alleys, and other highways, looking to the necessities and veniences of the inhabitants of said city, and looking also to the finan ability of said city to furnish said lights, and if you further believe from evidence that the maintaining of the present system of commercial li materially impairs the usefulness of said plant for so lighting said streets alleys of said city, you will find for plaintiffs, and also for the intervener McKinney Electric Light & Motor Power Company; but, in any event, will find against the intervener J. W. Webb."

The propositions submitted under this assignment are, in eff That it placed the burden on plaintiff to show that the plant l no more power than was necessary to furnish a sufficient num of arc lights for the reasonable lighting of the streets, and, a that the maintenance of the present system of commercial lig materially impairs the usefulness of said plant for lighting streets; whereas, if either proposition was established, plain would be entitled to recover. That it also placed the burden appellants of showing that the city had the financial ability furnish lights for the streets. We do not think the charge more onerous than the law required. The appellants based th right to the injunction upon the ground that the city did not h the power to furnish commercial lights, and it devolved upon pellants to show the nonexistence of such power. If the city not financially able to extend the lighting of the city, it had right to furnish the surplus electricity produced for private The city had exhausted its power to levy more taxes, and ability to extend the street lights was a proper matter for the j to consider. It was not improper to charge the jury that service should be "materially impaired." A slight impairm

would not be a sufficient ground for granting the injunction. *Power Co. v. City of Colorado Springs, supra.*

Assignments Nos. 7 and 8 complain of the refusal of special charges which, in effect, tell the jury that the city council had no right to sell electricity until all parts of the city were sufficiently supplied with street lights. These charges ignore the financial ability of the city to furnish more lights for the streets. In this respect we think they are erroneous and should not have been given. The foregoing applies to several other assignments of error made to the charge of the court and further notice here is unnecessary.

The fifteenth assignment complains of the court in charging the jury, in effect, that it was the duty of the city to establish and maintain sufficient mains and pipes to distribute water throughout the city reasonably sufficient for the convenience of its inhabitants, and until it had done so it had no right to divert the funds of said city or the money belonging to said city in any manner derived from its waterworks system for any other purpose, and if they found the council had not established such, and are using the money derived by taxation, or from the sale of its water for the purpose of manufacturing and selling commercial lights, to find for interveners. The evidence shows that the main portion of the town is supplied with mains and pipes for the distribution of water, and the extension of the water system should be left to the sound discretion of the city council. The proceeds arising from the sale of water was more than sufficient to pay the expenses of maintaining the system as installed, and the surplus moneys or profits derived became current funds, and the council had the right to divert said profits to other needs of the city. *Bank v. City of Terrell,* 78 Tex. 450, 14 S. W. 1003. The court did not err in refusing said charge.

The court charged the jury that the city did not primarily have power to furnish lights for private use, but, if the city had more power than was sufficient for the present condition and needs of the city, to find for said city. There being a surplus of power, the council had the right to expend current funds to put that power in use, and the expanding of such funds in supplying electricity sold to its citizens for private use was not in derogation of the Constitution relative to taxation.

That intervener had a franchise to furnish the inhabitants lights did not prevent the city from exercising the right to d The franchise of intervener was not exclusive, and had su right been granted by the city it would have been void, as power to grant such a franchise did not exist in the city. *of Austin v. Nalle,* 85 Tex. 520, 22 S. W. 668, 960. The f chise granted to the intervener did not prohibit the city f granting a similar right to some one else, nor of using it itsel

Under the facts the jury reached the correct verdict, and judgment is affirmed.

LUEHRMANN v. LACLEDE GASLIGHT CO.

Missouri — St. Louis Court of Appeals — Oct. 22, 1907.

127 Mo. App. 213, 104 S. W. 1128.

1. INJURY TO HORSE FROM CONTACT WITH LIVE WIRES IN STREET — P MATE CAUSE. — In an action for injuries resulting from contact live wires in the street, it appeared that the defendants' electric wires were strung over coal sheds, thence along a porch and down t first floor of a building; that the insulation of the wire near wh was fastened to the corner of the porch was off; that two boys pl on top of the coal sheds pushed a bailed hay wire along the electric to the point where the insulation was off; that this hay wire hung in the street in a pool of water; that plaintiff drove his horse int wire, resulting in the death of the horse from electric shock and in to the plaintiff. *Held,* that the defendant, not being responsible fo act of the trespassing boys, was not liable for the injuries sustained

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Injuries to Horses from Electricity. — As to injury to a horse contact with a pole supporting an electric sign, see *Memphis Consolidate & Electric Company v. Speers, ante.* As to injury from contact with a t wire in the street, see *Cleary v. St. Louis Transit Co., ante; Augusta Ra & Electric Co. v. Weekly, ante.* As to death of a horse from contact w wire which had been thrown over a trolley wire, see *Jones v. Union Ra Co., ante.* As to injury to a horse by stepping into a pool of water ch with electricity escaping from a railway company's wires and poles, see *K stein v. Fairhaven & W. R. Co., ante.* As to death of a horse from co with an electric light wire in the street, see *Eagle Hose Company v. El Light Co., post.* As to death of a horse by contact with a telephone wi the street, which had been broken by a storm and had fallen across an el light wire, see *Aument v. Pennsylvania Telephone Co., ante.*

As to injury to horses by contact with rails charged with electricit *Wood v. Wilmington City Ry. Co., ante,* and note thereunder collatin cases in this volume.

2. SAME — DUTY OF ELECTRIC COMPANY TO INSULATE WIRES. — The duty of an electric company to insulate and keep its wires insulated is a continuing one, and requires careful and continuous inspection.
3. SAME — NOTICE OF UNSAFE CONDITION OF WIRES. — Notice of the unsafe condition of wires may be imputed to an electric company on evidence that its wires have been in that condition for a considerable length of time.
4. SAME — EVIDENCE. — Evidence examined and *held* to be sufficient to justify a jury in finding an electric lighting company negligent in maintaining an unsafe wire.

Appeal by plaintiff from a judgment overruling his motion to set aside a nonsuit. *Affirmed.*

W. L. Bohnenkamp, for appellant.

Percy Werner and *R. A. Crabbs,* for respondent.

Opinion by BLAND, P. J.:

The Hugo Dry Goods Company has a three-story building on the northwest corner of Twenty-third street and Cass avenue, in the city of St. Louis. The building fronts on Cass avenue, and runs back north on Twenty-third street to an alley. The first floor of the building is occupied by the company as a store. The second and third floors are used for residence purposes, and are constructed to front on Twenty-third street. A wooden porch forty-five feet long runs along the east side of the building for the benefit of tenants occupying the second and third floors. In the back yard of the premises are coal sheds ten to fourteen feet high. Defendant maintains a line of electric wires strung on poles about twenty-five feet high in the alley running on the north side of the premises. The poles are much higher than the coal sheds. For the purpose of furnishing the Hugo Dry Goods Company electric light, defendant strung a wire from one of its poles in the alley, over the coal sheds to a corner of the porch, thence along the porch, and down to the first floor. This wire inclined downward from the pole to the porch, but was from five to six feet above the top of the sheds. For some time prior to May 4, 1905, about an inch of the covering or insulation of the wire near where it was fastened to the corner of the porch had been off, leaving the wire exposed. From what cause or by what means the insulation was removed the evidence does not show. On said date two boys were seen on top of the coal sheds playing with a baled hay wire, the end of

which had been bent and thrown over the electric wire. Some of the witnesses say the boys were trying to get it off the electric wire. In manipulating the wire it was caused to slide toward the porch. When it was near the porch, the boys went to a nearby stable, and got a bunch of tangled baled hay wire, and in some manner connected it with the down wire, and pushed it along the electric wire until it reached the spot where the insulation was off. At this juncture the bunch of wires were in a pool of water that had collected in the alley from a recent rain, and the wires began to sputter and emit sparks of electricity, whereupon the boys ran away. In a few minutes thereafter plaintiff drove a milk wagon into the alley to make a delivery of milk. He did not observe the wires, and his horse stepped into them, and instantly fell to the ground, and was electrocuted in a few minutes. When the horse fell, plaintiff leaned over the side of his wagon to see what caused him to fall, and was thrown from the wagon by the force of an electric current into the alley, where he received several other electric shocks from coming in contact with the horse's feet as he kicked in his death struggles. Plaintiff was picked up, and helped to a drug store. The action is to recover damages caused by the electric shocks. The negligence alleged is that defendant maintains its wires in a careless and negligent condition, and negligently failed to properly insulate them and negligently failed to keep them insulated prior to and on the day of the accident (May 4, 1905). At the close of plaintiff's case, the court gave an instruction in the nature of a demurrer to his evidence, whereupon plaintiff took a nonsuit, with leave to move to set the same aside. The motion to set aside the nonsuit was overruled, and he appealed to this court.

The question presented for review is whether or no plaintiff made out a *prima facie* case. In the consideration of this question, the most favorable construction that it will admit of must be given to plaintiff's evidence, and every reasonable inference therefrom in his favor be drawn. It is in evidence that a short time before the accident defendant's servants were at the premises reinsulating the wires leading along and down from the porch. On this evidence, and on the evidence that the uninsulated portion of the wire was very near the porch and was plainly to be seen, the inference should be drawn that if defendant's servants saw

or would have seen, if they had exercised ordinary care, that the insulation was off the wire, and did not see it, or, seeing it, failed to reinsulate it, they were negligent. Notice of the unsafe condition of the wire may also be imputed to defendant on the evidence that it had been in that condition for a considerable length of time. Thorough insulation is indispensable to confine the electric curent to wire; and hence the duty of defendant to insulate and keep its wires insulated was a continuing one, and required careful and continuous inspection. *Geismann v. Missouri-Edison Electric Co.,* 8 Am. Electl. Cas. 569, 173 Mo. 678, 73 S. W. 654; *Winkelman v. Electric Light Co.,* 9 Am. Electl. Cas. 335, 110 Mo. App. 184, 85 S. W. 99. We think, therefore, that on the evidence with respect to the condition of the wire, the jury would have been justified in finding defendant was negligent in maintaining an unsafe wire. But the mere negligence of defendant in maintaining an unsafe wire is not alone sufficient to entitle plaintiff to recover. It is essential to plaintiff's cause of action that he show the negligence complained of was the proximate cause of his injury. Lexicographers, text-writers, and courts have repeatedly undertaken to define proximate cause. The definitions given by them are of but little help in the application of the doctrine to the particular facts in a given case, unless the facts fall precisely within those of the cases where the definition has been applied. No case has been cited where the facts are on all fours with the facts of the case in hand. Plaintiff, however, contends they are not distinguishable from the facts in the case of *Harrison v. Kansas City Electric Light Company,* 9 Am. Electl. Cas. 729, 195 Mo. 606, 93 S. W. 951, 7 L. R. A. (N. S.) 293. In the Harrison case defendant maintained, in Kansas City, Mo., a circuit of wires strung on poles known as "circuit No. 32," which was only operated at night time. The insulation had been worn off the wire by the limbs of a tree in deceased's yard reaching over the wire and rubbing against it when the wind blew. Deceased's son, a youth, on the day of the accident, connected a copper wire to defendant's wire where the insulation was removed, and wrapped the copper wire around the tree. At the time a swing of cable wire was swung to one of the limbs of the tree. One of the cables was too long and was wrapped about the tree. In the afternoon of the day of the accident, the line was reported to the company

to be "in trouble," and a lineman was sent out to discover and remove the difficulty. He failed to discover the down wire the boy had attached, but reported the line "O. K." to the company, after which the current was turned on at about 7.25 P. M. After the current was turned on, the boy discovered the tree around which he had wrapped the wire was burning, and got an ax and chopped the wire in two, leaving it swinging in the air about four feet above the ground. His father stepped out of the house a few minutes later, and took hold of the swing, and was instantly killed by the electric current making a short circuit by means of the cable wire, etc. It was contended that the negligence of defendant's lineman in reporting the line "O. K." was not the proximate cause of the injury. After reviewing several of the Missouri cases at pages 623–625 of 195 Mo., pages 956, 957, of 93 S. W. (7 L. R. A. [N. S.] 293), MARSHALL, J., writing the opinion, at pages 627, 628, of 195 Mo., pages 957, 958, of 93 S. W. (7 L. R. A. [N. S.] 293), said:

"The negligence of the lineman was the negligence of the defendant, and, if he failed to report the fact that he had not discovered and remedied the trouble, his failure is imputable to the defendant. Under the circumstances, there is no escape from the conclusion that the defendant was negligent in turning on the current of electricity after it knew that there was trouble, without making a test at the main office to discover the true state of affairs, and without positively knowing that the trouble had been remedied. The fact that its negligence would not have resulted in the injury complained of except for the independent intervening negligence of the son of the deceased does not relieve the defendant from liability, for the act of the son of the deceased could not have produced the injury unless the defendant had turned on the current of electricity, nor unless there had also been a second ground somewhere else. The defendant's negligence was therefore a direct and proximate cause, or one of the direct and proximate causes which concurred with the act of the son of the deceased to produce the injury, and, under the rule in this State, the defendant is liable."

This case and some of the cases cited in the opinion of the learned judge seem to oppose the general rule that the proximate cause is one from which a man of ordinary experience and sagacity could foresee or contemplate the result which followed might probably follow. *American Express Co. v. Risley,* 179 Ill. 295, 53 N. E. 558; *Missouri, K. & T. Ry. Co. v. Byrne,* 100 Fed., loc. cit. 363, 40 C. C. A. 402; *Milwaukee, etc., Ry. Co. v. Kellogg,* 94 U. S. 469, 24 L. Ed. 256; *Railroad Co. v. Woolley,* 77 Miss, loc. cit. 943, 28 So. 26; *Enochs v. Railway Co.,* 145 Ind., loc. cit. 637,

44 N. E. 658; 16 Am. & Eng. Enc. of Law 436. If defendant's line had been reported or discovered to be "in trouble," and it had sent a "trouble man" out to discover and remedy the difficulty, and he had failed to discover the wire which was hooked over defendant's wire, and reported the line "O. K.," and defendant had then turned on the electric current and the injury complained of resulted, the case would be on all fours with the Harrison case. But defendant's line was not in trouble until the baled hay wire was pushed along its wire to the point where the insulation was off, and this was not done until a few moments before the accident, and it seems to us to hold the defendant liable we must hold it was responsible for the act of the trespassing boys. To do this would practically make defendant an insurer of the lives and limbs of every person against loss or injury caused by the wrongful and unlawful tampering with its wires by any and all persons whomsoever. Our Supreme Court has not gone so far, and we will not take the step of our own volition.

We think the demurrer to the evidence was properly given, and affirm the judgment. All concur.

LOUISVILLE LIGHTING CO. v. OWENS.

Kentucky Court of Appeals — Nov. 27, 1907.

32 Ky. L. R. 283, 105 S. W. 435.

INJURY FROM FALL OF ELECTRIC STREET LAMP — NEGLIGENCE — EVIDENCE. — In an action for injuries sustained by a traveler who while passing along the street was struck by an electric lamp which because of the breaking of a rope fell as an employee of the defendant was raising it to its position, the defendant in order to relieve itself from liability must show that its employee in charge was reasonably prudent and skillful, and that the rope had a latent defect which could not have been discovered by a person with reasonable skill and prudence in the business.

Maintenance of Arc Lights in Streets. — An electric light company is bound to maintain arc lights in safe condition and where a lamp falls because of defective rope or other appliances and injures a traveler the company is liable. *Excelsior Electric Co. v. Sweet*, 57 N. J. L. 224, 30 Atl. 553. See also *Miller v. Lewiston Electric Light, Heat & Power Co., ante*,

Maintenance of Arc Lights in Buildings. — See note to *Fish v. Kirlin Gray Electric Co., ante.*

Appeal by defendant from a judgment for plaintiff. *Affirmed.*

Robert E. Woods, Fairleigh, Straus & Fairleigh, and *Humphrey & Humphrey,* for appellant.

F. Hagan, for appellee.

Opinion by NUNN, J.:

This action was instituted by the next friend of appellee for damages the result of an injury he received, at a point where Webster street and Story avenue cross in the city of Louisville, by a lamp falling on him, which was suspended over the crossing by appellant to one of its wires. The lamp dropped about twenty feet. It was made of glass and iron, and weighed thirty-five or forty pounds. Appellee was driving his wagon at the time along the street. The lamp struck him on the left side of the head, and on the left shoulder, which caused him to lose the use of his left arm. Several physicians testified that in their opinion the arm was permanently disabled. At the time the accident occurred an employee of appellant, McGill, had just lowered the lamp from its position on the wire, and at the moment he elevated the lamp to its position on the wire the rope broke within about six inches of the lamp, which let it fall on appellee. Whether McGill caused it to fall or what caused the rope to break does not appear. Appellant by its answer admitted the falling of the lamp and the injury to appellee, and alleged that the fall was not caused by the negligence or any want of due care upon its part. This was controverted. Appellant upon this issue introduced three witnesses, namely its superintendent, a member of the firm from whom it bought the rope, and McGill, the employee who kept the lamps in proper condition for lighting. The superintendent testified the rope had been in use seven or eight months; that it ought to have remained in good condition for about two years; that it was of the best quality of tarred manilla rope, and either three-eighths or one-half inch in diameter; that he bought it from a reputable firm. A member of this firm testified to the same effect. McGill testified that he let this lamp down every other day, and looked at it and he could see nothing wrong with it; that it appeared to him to be in proper and safe condition. McGill was asked by appellee's council the following question: "Q. Did you in the front

of Mrs. Owens' door, about three days after this thing happened, tell Mrs. Owens (in the presence of appellee) that that rope that broke was rotten, and you knew it and you had informed the company about it? A. No, sir; I don't think I did." Appellee testified that he was present with his mother, and that the witness McGill did make that statement to her. The court then told the jury that they could not consider the testimony of appellee as to what occurred between McGill, his mother, and himself as substantive evidence, but they could consider it only for the purpose of determining the credibility of the witness McGill. The parties each introduced four physicians who testified as to the extent and seriousness of appellee's injuries. Appellee could not use his arm at the time of the trial. Some of the physicians gave it as their opinion that it would improve, and others that it would always remain useless. The court gave the jury the following two instructions:

"(1) You should find for the plaintiff unless you shall believe from the evidence that the fall of the lamp which injured him was not caused by the negligence of the defendant or its agents or employees in looking after or maintaining the said lamp and its attachments. (2) But, if you shall believe from the evidence that the fall of the lamp was not caused by the negligence of the defendant or its agents or its employees in caring for the said lamp and maintaining it or its attachments, then the law is for the defendant and you should so find."

The court gave another instruction giving the proper criterion upon which the jury might assess the damages, and defined ordinary care and negligence. The jury found a verdict for $5,000 in favor of appellee. Appellant filed grounds and moved the court for a new trial.

The court overruled the motion, and delivered the following opinion, which admirably sums up the facts of this case:

"The evidence of the defendant showed: That the rope which broke and caused the injury was either a three-eighths or one-half tarred manilla, and was bought from a reputable dealer. If it was three-eighths, it would safely sustain a weight of 400 pounds; if one-half, a weight of from 600 to 800 pounds. That it had been in use only six or eight months, and was inspected every second day and that the life of such for the purpose it was then being used was not less than two years; yet the rope broke under the strain of raising an electric lamp weighing thirty or forty pounds. With such evidence before them from the defendant's witnesses, the jury might well conclude that an inspection of the rope made with ordinary care by a reasonably competent man must have disclosed the defect which caused it to break under a strain relatively so insignificant."

Under the pleadings and facts stated the presumption was that appellee's injuries resulted from the negligence and want of care of appellant's servants, and the burden was upon it to show to the contrary. When a thing which causes injury is shown to be under the management of defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords evidence in the absence of explanation of the defendant that the accident arose from want of care. See Sherman & Redfield on Negligence, § 60. The happening of an accident, which in the usual and ordinary course of things would not happen with proper care, cast the burden on defendant to explain the accident so as to relieve itself from liability. We have examined the testimony in this case with care, and have been unable to find any evidence giving any reason or cause why the lamp fell. It was not shown that the rope was rotten, or that it had been worn by use that caused it to break, or whether there was some latent defect in the rope that could not have been ascertained by ordinary care. There was not one witness who professed to have examined the rope after the lamp fell, and no one attempted to state the lamp was caused to fall by the manner of its use by McGill. There was no evidence introduced showing that McGill was skilled in that business or prudent and careful, nor did McGill attempt to give reason why the lamp fell. For appellant to have relieved itself from liability it was necessary for it to show that McGill, the person in charge was reasonably prudent and skillful in that business, and to have given some explanation why the lamp fell at that particular time. In other words, that the rope had a latent defect which could not have been discovered by a person with reasonable skill and prudence in that business, and this appellant failed to show.

For these reasons, the judgment of the lower court is affirmed.

GUEST v. EDISON ILLUMINATING CO.

Michigan Supreme Court — Dec. 10, 1907.

150 Mich. 438, 114 N. W. 226.

1. CARE REQUIRED BY ELECTRIC COMPANY.—An electric company is not an insurer of the safety of its employees.
2. SAME—AUTHORITY OF FOREMAN.—A foreman of an electric company has no authority to bind the company by an agreement with an electrician to watch a switch box and see that it is not interfered with while the electrician is at work, and a failure to perform such an agreement does not render the company liable for injuries sustained by the electrician.

Error by plaintiff from a judgment for defendant. *Affirmed.*

Before MCALVAY, C. J., and CARPENTER, GRANT, BLAIR, and MOORE, JJ.

Samuel W. Burroughs, for appellant.

Keena, Lightner & Oxtoby, for appellee.

Opinion by BLAIR, J.:

Plaintiff brought this action to recover damages for injuries received through the negligent closing of an electric switch, whereby a current of electricity was conducted into certain wires upon

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Care Required of Electrical Companies for Safety of Employees and Others.—Electrical companies are not insurers of the safety of their employees, and it is held that the general rule as to the assumption of risk applies. **United States:** *Britton v. Centarl Union Telephone Co.,* 131 Fed. 844, 65 C. C. A. 598. **Connecticut:** *McGorty v. Southern N. E. Telephone Co.,* 69 Conn. 635, 38 Atl. 359. **Delaware:** *Strattner v. Wilmington City Electric Co.,* 3 Pen. 245, 50 Atl. 57. **Illinois:** *Chicago City Ry. Co. v. Euroth* 113 Ill. App. 285. **Indiana:** *Union Traction Co. v. Buckland,* 34 Ind. App. 420, 72 N. E. 158. **Massachusetts:** *Meehan v. Holyoke Street Ry. Co., ante,* 3 St. Ry. Rep. 378, 186 Mass. 511, 72 N. E. 61; *Hall v. Wakefield & S. St. Ry. Co.,* 178 Mass. 98, 59 N. E. 668; *Gavin v. Fall River Automatic Telephone Co.,* 185 Mass. 78, 69 N. E. 1055. **Michigan:** *Guest v. Edison Illuminating Co.,* (reported case); *Harrison v. Detroit, etc., Ry. Co., ante,* 137 Mich. 78, 100 N. W. 451; *Mayer v. Detroit, Ypsilanti, etc., Co.,* 105 N. W. 888. **Minnesota:** *Soutar v. International Electric Co.,* 68 Minn. 18, 70 N. W. 796; *Saxton v. Northern Telephone Exchange Co.,* 81 Minn. 314, 84 N. W. 109. **Nebraska:** *New Omaha Thomson Houston Electric Light Co. v. Dent,* 8 Am. Electl. Cas. 648, 68 Neb. 668, 94 N. W. 819. **New Hampshire:** *Carr v. Manchester Electric Co.,* 70 N. H. 308, 48 Atl. 286; *Shaw v. Manchester Street Ry. Co.,* 73 N. H. 65, 58 Atl. 1073. **New Jersey:** *Western Union Telegraph Co. v. McMullen,* 58 N. J. L. 155, 33 Atl. 384; *Chandler v. Atlantic Coast Electric Ry. Co.,* 61 N. J. L. 380, 39 Atl. 674. **New York:** *Flood v. Western Union*

which plaintiff was working within the line of his duty. Th defendant, the Edison Illuminating Company, was constructin and had nearly completed a plant at Delray, in Wayne count The general manager of the company was Alexander Dow. In

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Telegraph Co., 4 Am. Electl. Cas. 402, 131 N. Y. 603, 30 N. E. 196. **Wi consin:** *Zentner v. Oshkosh Gaslight Co.*, 132 Wis. 447, 112 N. W. 449.

Although electrical companies are not insurers of the safety of their e ployees and others in lawful proximity to their wires it is held, in some cas that they must exercise the highest degree of care. *Colorado Springs Electr Co. v. Soper, ante*, 38 Colo. 141, 88 Pac. 165; *Harter v. Colfax Electric Lig & Power Co., ante*, 124 Iowa 500, 100 N. W. 508; *Temple v. McComb Ci Electric L. & P. Co., ante*, 89 Miss. 1, 42 So. 874; *Byerly v. Consol. L., P. Ice Co.*, 130 Mo. App. 593, 109 S. W. 1065; *Haertel v. Penn. L. & P. Co.*, 2 Pa. 640, 69 Atl. 282; *Graves v. Washington Water Power Co., ante*, 44 Was 675, 87 Pac. 956; *Bice v. Wheeling Electrical Co.*, 62 W. Va. 685, 59 S. 626; *Macon v. Paducah Street Ry. Co.* and *Padulah E. L. Co.*, 7 Am. Elec Cas. 630, 23 Ky. L. R. 46, 62 S. W. 496; *Will v. Edison Electric Illuminati Co.*, 7 Am. Electl. Cas. 642, 200 Pa. 540, 50 Atl. 161. And in other cases is held that the utmost care should be exercised to protect others from dange *Colusa Parrot Mining & Smelting Co. v. Monahan*, 162 Fed. 276; *Manga Adm'r v. Louisville Electric Light Co., ante*, 122 Ky. 476, 91 S. W. 70 *Winkleman v. Kansas City Electric Co., ante*, 111 Mo. App. 184, 85 S. W. 9 *Haynes v. Raleigh Gas Co.*, 5 Am. Electl. Cas. 264, 114 N. Car. 203; *Perka v. Portland Electric Company*, 7 Am. Electl. Cas. 487, 33 Ore. 451. A hi degree of care is required of electric companies. *Spires v. Middlesex & Mo mouth Electric L., H. & P. Co., ante.*, 70 N. J. L. 355, 57 Atl. 424; *Texarka Tel. Co. v. Pemberton*, 111 S. W. 257; *Newark Electric Light & Power Co. Garden*, 6 Am. Electl. Cas. 275, 78 Fed. 74, 23 C. C. A. 649; Newark Electr *Light & Power Co. v. McGilvery*, 7 Am. Electl. Cas. 529, 62 N. J. L. 451, Atl. 955. This duty to exercise a high degree of care is imperative. *Fisher City of Newbern, ante*, 140 N. Car. 506, 53 S. E. 342.

Many cases hold that electric companies should exercise a reasonable degr of care. *Cumberland Telephone & Telegraph Co. v. Graves' Adm'x, ante*, Ky. L. R. 972, 104 S. W. 356; *Warren v. City Electric Ry. Co., ante*, 12 D Legal News, 415, 104 N. W. 613; *Gilbert et al. v. Duluth General Electric C ante*, 115 Minn. 171, 100 N. W. 657; *Bourke v. Butte Electric & Power C et al., ante*, 33 Mont. 267, 83 Pac. 470; *Griffin v. United Electric Light C* 6 Am. Electl. Cas. 252, 164 Mass. 492; *Anderson v. Jersey City Electric Lig Co.*, 7 Am. Electl. Cas. 557, 63 N. J. L. 386; *Caglione v. Mount Morris Electr Light Co.*, 7 Am. Electl. Cas. 622, 56 N. Y. App. Div. 191. But it seems be a well established rule that the degree of care exercised should be co mensurate with the danger involved. *Parsons v. Charleston Consol. Ry., G & Electric Co. et al., ante*, 69 S. Car. 305, 48 S. E. 284; *Barto v. Iowa Te phone Co., ante*, 121 Ia. 241, 101 N. W. 876; *Jacksonville Electric Co. v. Slo ante*, 52 Fla. 257, 42 So. 516; *Commonwealth Electric Co. v. Melville, an* 210 Ill. 70, 70 N. E. 1052; *Martin v. Des Moines Edison Light Co., ante*, 1 Ia. 724, 106 N. W. 359.

See generally note to *Carr v. Electric Co.*, 7 Am. Electl. Cas. 746, 757.

mediately under Mr. Dow, and having supervision of the operation of the plant at Delray, was George W. Cato. Under Mr. Cato was Hiram Ford, who was superintendent of interior construction. Frank Davis, foreman of defendant, and the other electricians and wiremen, worked under the general direction of Mr. Ford. Plaintiff testified: "I was injured there September 26, 1904. I was working at that time under Mr. Davis. His position was foreman of the electricians of the plant which I have been speaking about." At the time of his injury, plaintiff was doing certain work on top of the boilers, putting in conduits, wires, sockets, and lamps for lighting above certain boilers in the boiler room, some twenty-one feet above the floor, for the purpose of lighting the water gauges. On the day before his injury, plaintiff had complained to the foreman that the plant was in a dangerous condition, and, to obviate the danger complained of, a switch box was put in in accordance with plaintiff's instructions. Plaintiff testified:

"It was my duty to inspect that box before going to work. I did inspect it. That was in accordance with the rules of electricians. In connection with the inspection I found the box to be perfectly safe. . . . Mr. Davis told me, if I would go up to work there, he would see that that switch box was kept open all the time I was up there. He would see. He would be in a position to do it. I relied upon my inspection first and Mr. Davis' agreement with me, what he said. When I had this conversation with him, he was at the switch box in this plant where it was situated. In the presence of Mr. Davis, for the purpose of making it safe, I threw the switch open. I turned it down. I opened it. I nailed the lid on the box, in that shape [illustrating]. My purpose of nailing the lid on the box was so that no person would put their hand in there and throw the lever up. I put a written notice on that box for no person to throw the switch in or some word to that effect. That notice consisted of an official card of the company. That was in the line of my duty to do that. . . . He said he would see the switch was kept open every moment I was up there."

While working on one of the sockets, "the electricity came on me, and held me there. I could not get off, and it grounded me there. My weight carried me off to the floor below. * * * I fell from there to the floor. I account for that — some person threw in the switch. * * * After I fell, I saw Mr. Davis, the foreman, about two or three minutes after. * * * He says, 'I forgot that you were up there.' * * * This man Davis was the foreman of that company. He had charge of all the electricians. It was under him that I was working. * * * Q. What was the

duty of this foreman under the rules of the company, if you kn
with reference to seeing after it that the electricians were saf
guarded while you are at work? A. To take due care of all t
men that were in the plant engaged in electric work, meaning
that to see that the machinery was so protected that electric
could not pass to the electrician who was at work. Q. When y
went above just after you had made the inspection and closed t
switch box and had had the talk with Mr. Davis, was that swi
box perfectly safe? A. It was. It was open. If the switch h
been kept open under the observation and guardianship of M
Davis, this injury could not have occurred to me as a result
my fall. * * * Davis was subject to Mr. Cato's orders, I thi
Mr. Ford was down there over all the plant. Q. Mr. Ford —
you know about this, answer it — had charge of the constructi
work for the Edison Illuminating Company. A. I think he h
some charge. I know he did the hiring out there, and put
under Mr. Davis. I went to Mr. Cato, and he told me to go
Mr. Ford, and Mr. Ford hired me and put me in charge of M
Davis. Mr. Ford is one of the officials of the company. I thi
Mr. Ford's work was to attend to the construction work in t
company. He had charge over all, but he was not there at
times. When he was not there, it was Mr. Davis had to see to
* * * I could not tell how many other men than myself a
the helper were at work under Davis' direction there. Th
might have been more than ten or fifteen; I don't know how ma
men. I was working alone in that business. * * * Duri
this time I was at work there, Mr. Davis and his men, includi
my helper, were at work at other parts of the building. I was t
only one in the electrical department at work in this boiler roo
When I came down at noon I guess Mr. Davis had gone to dinn
Q. When you came back where was Mr. Davis? A. He was
there, but I inspected the switch. Mr. O'Hara was there, and
went and looked at the switch. * * * The switch was all rig
then. It had the cover on it. It was nailed on. There was
notice across the front. It said no person should throw in t
switch, or words to that effect. I wrote that myself and put it
on the card. * * * It was the rule of the company that a
man that was at work on any line which needed protection shou
put up a notice. The purpose of that was to prevent anybo

from going and turning on the switch and hurting the men. I knew those rules. In pursuance of that rule, I put the notice on under Mr. Davis' agreement when I went to work. * * * And, unless somebody had violated that notice and turned on the switch, I would not have been hurt. Q. But do you know who it was turned on that switch? A. I don't, because I was out of sight of the switch box when it was turned on. When Mr. Ford hired me and put me to work, it was some time in July. This was preceding the September that I was hurt. Mr. Ford instructed me to go to work under Mr. Davis. * * * I worked from about 9 to 2.30." Mr. Davis testified: "I work under the direction of Mr. Ford. His general authority or business was that he superintended the general construction of the work. Mr. Cato was superintendent of all the departments. I do not know who turned that switch." He also testified: "I was watching the general work of the plant, overseeing it, and that was my duty to do that as foreman over those wire workers and electricians and that is what I was doing on that day." After the close of the testimony the court, upon motion of defendant's counsel, directed a verdict for defendant upon the ground that the foreman, Davis, was a fellow servant of the plaintiff, and the defendant company was not responsible for his negligence, nor bound by his agreement to watch the switch box and see that the switch was not closed. Plaintiff brings the record to this court by writ of error upon various assignments of error, the principal of which, and the only one which we think it necessary to consider, is that the court erred in holding that Davis was a fellow servant of plaintiff, plaintiff contending that he was a vice-principal.

Unless the foreman's failure to perform his agreement to watch the switch box, and see that it was not interfered with was a failure to discharge a duty which the corporation owed to plaintiff, no negligence was proved on its part. On the contrary, the plaintiff's evidence conclusively demonstrates that, except for the alleged new duty arising from the agreement, the defendant discharged its full duty to plaintiff. Independent of the agreement, there was certainly no rule of law which made the defendant an insurer of the plaintiff's safety. If the agreement acquired binding force against the defendant, it was not because authority had been impliedly delegated to the foreman to make it in discharge

of an absolute duty of the defendant, but because his position foreman authorized him to bind the defendant to the performa of an absolute duty which theretofore had not existed and wh was in derogation of its rules. Whether any officer of a corpo tion, however high his grade, would be acting within the scope his authority in making such an agreement for the corporation is unnecessary to determine. We are satisfied that the forem Davis, possessed no such authority, and that in making the ag ment he did not represent the defendant.

The defendant was not liable for the negligence of the forem and the court did not err in directing a verdict. *Wellihan Wheel Co.*, 128 Mich. 1, 87 N. W. 75; *Mikolojczak v. No. Am Chemical Co.*, 129 Mich. 80, 88 N. W. 75; *Page v. Battle Cr Pure Food Co.*, 142 Mich. 17, 105 N. W. 72.

The judgment is affirmed.

DE KALLANDS v. WASHTENAW HOME TELEPHONE CO.

Michigan Supreme Court — May 26, 1908.

153 Mich. 25, 116 N. W. 564.

1. INJURY TO TELEPHONE LINEMAN — DUTY OF COMPANY TO FURNISH IN LATED WIRE — EVIDENCE — QUESTION FOR JURY. — In an action by a t phone lineman to recover for injuries received while stringing wires one of them coming in contact with a trolley wire, *held* that there an abundance of testimony to justify the trial judge in submitting to jury the question whether it was the duty of defendant to have furnis the plaintiff with a sufficient quantity of insulated wire, and whethe discharged such duty.
2. SAME — EFFECT OF NEGLIGENCE OF FELLOW SERVANT. — The fact tha telephone wire from which plaintiff was injured fell across a trolley v through the negligence of plaintiff's fellow servant does not preven recovery, since an employee may recover for the negligence of his ployer although the negligence of a fellow servant contribute to injury.

Judicial Notice as to Dangerous Qualities of Electricity. — Co will take judicial notice that electricity is dangerous. *Warren v. City Elec Ry. Co., ante*, 12 Det. Leg. News 415, 104 N. W. 613. That lighting may conducted along grounded telephone wires. *Owen v. Portage Telephone ante*, 120 Wis. 412, 105 N. W. 924. That guy wires are liable to bec charged by contact with other wires. *Law v. Central District P. & T. ante*, 140 Fed. 558. It is also a matter of judicial notice that electricity be safely conducted and used as an agent for the production of light, hea power. *Alexander v. Nanticoke Light Co., ante*, 209 Pa. 571, 58 Atl. 1068.

3. METHOD OF DRAWING WIRES — QUESTION FOR JURY. — In an action by a telephone lineman for injuries received while stringing wires, it was held that whether the plaintiff's method of drawing two wires across other wires at once was more unsafe than to draw them across one at a time, was, under the evidence, a question of fact for the jury.
4. PROXIMATE CAUSE — DIRECTION OF VERDICT. — In an action by a telephone lineman to recover for injuries resulting from the dropping of uninsulated wires upon a trolley wire by a fellow servant, it was not error to refuse to direct a verdict for the defendant on the ground that the uninsulated wire was not the proximate cause of the injuries, where there was evidence tending to show that the defendant failed to furnish a sufficient quantity of insulated wire.
5. NATURE OF ELECTRICITY — JUDICIAL NOTICE. — Electricity is to be classed with gunpowder, dynamite, and other treacherous and destructive agents of whose dangerous qualities judicial notice will be taken, as well as of the fact that society recognizes them and acts accordingly.
6. ASSUMPTION OF RISK BY LINEMAN. — A telephone lineman assumes the risk of contact with highly charged wires which may be formed and is most likely to be occasioned by other means than seizing hold of said wires.
7. CONSTRUCTIVE NOTICE TO LINEMAN OF GROUNDING OF WIRES. — Grounding of telephone wires is such an essential fact in the business of a telephone company that a lineman who had worked for the company as troubleman, lineman, groundman, and otherwise for over a year, must be charged with constructive notice of such fact.
8. SAME. — The rule that the employee does not assume the risk of dangers arising through the negligence of the employer does not apply where the negligence and resulting danger are discovered by and known to the employee before entering upon the performance of the work.

Appeal by defendant from judgment for plaintiff. *Reversed.*

Before GRANT, C. J., and BLAIR, MONTGOMERY, CARPENTER, and MCALVAY, JJ.

A. J. Sawyer & Son, for appellant.

Frank A. Stivers and *M. J. Lehman,* for appellee.

Opinion by BLAIR, J.:

Plaintiff brought this action to recover for injuries received by him while in the performance of his duties as a lineman in the employ of defendant in stringing wires for a telephone, which he had been directed to put in by defendant. The declaration contains one count, and charges as negligence: (1) The failure to furnish a sufficient number of competent fellow servants; (2) the failure to furnish properly covered or insulated copper wire; (3) the failure to furnish suitable and proper hand lines; and (4) the failure to furnish suitable reels. Upon the conclusion of the

plaintiff's case, the defendant moved the court to direct a verd for the defendant, which motion was denied. The motion direct a verdict was renewed by defendant at the close of the c and again denied. Defendant also submitted requests to char requiring the direction of a verdict, which were refused by court, and the case was submitted to the jury upon the quest whether the defendant had negligently failed to furnish insula copper wire; the court having determined the other allegations negligence against the plaintiff. Defendant has removed record to this court for review upon writ of error, insisting tha verdict should have been instructed in favor of the defendant the reasons: (1) that the plaintiff's injuries were due to negligence of a fellow servant; (2) because the plaintiff had cho an unsafe way of stringing the wire, when a safe way was equa open to him; (3) that the failure to furnish insulated wire not the proximate cause of the injury; (4) that the plaintiff sumed the risk of the dangers due to the use of uninsulated wi and (5) that the defendant was not guilty of negligence.

Plaintiff testified as follows as to his experience:

"I worked for the company here in the city about seven months, perh six or seven, and for the Bell Telephone Company for about a year altoget That would make two years very nearly that I worked at the business, lack a few months. I think I was at the university about three months. I whatever I was told to do. I worked for the Washington Light and Po Company, too. I did what they told me to, if I could do it. I always tempted to obey orders. If I did not know, somebody quickly explained it me. I did not always, when they told me to do anything, find out wha meant and why it was done. I passed my degree as an apprentice, and f got my card as an apprentice, and, after I had shown myself competent the business, was given a full-fledged lineman's card. I think I received t card from the hands of the union about June, 1904. I was hurt in Aug 1905."

He was assisted in the work in question by a young man by name of Werner, who had worked for the company for some ti and who was, as he testified, a competent assistant. The stri ing of the wires required them to cross over an electric trolley w and certain electric light wires. Plaintiff testified that Spence, the wire chief of defendant company, gave him a c with the address of the place that he was to put the telephone "All these companies simply give an order to put in light or t phone in such a house, or wire such a house; that is all there to it. We have sense enough to know that we have the job in

hands, and we have to go and do it. And we take such help and material as we please, and go and do it, if the help and material are there. We are not instructed how to climb the pole or throw the line, or draw it, or anything of that kind. That is part of the work that we are expected to know enough to do. I cannot recollect who got the material for me when I got the order to put in this telephone. Henry Werner was to help me. Henry and I went and got the material * * * and loaded it onto the wagon. Q. They did not select the wire for you? A. We had to take what there was. There was none to select from. They did not select the wire. Q. You did not enter any complaint to them that there was not any such wire there as you wanted? A. I spoke about it; yes, sir. Q. To whom did you speak? A. Mr. Spence, I think. Q. What did you say to Mr. Spence? A. I simply mentioned the fact, I cannot remember the words, or anything, but merely the fact that I mentioned the absence of covered wire on the day when I went over the trolley the first time, because we did not have enough that time, and I had to splice it out with bare wire in order to make the whole space between the poles. Q. Did you make any complaint to Mr. Spence that you did not have covered wire to make this connection? A. I asked for more, yes. * * * Q. Did he make you any answer at all? A. Oh, yes; but I cannot remember it. I couldn't have selected the kind of wire or the proper wire. There was none other. There was nothing to select from. I took all there was, and then I told Mr. Spence that there was no copper wire, and he told me to finish the job."

Plaintiff further testified:

"The pole that I went up in the first place was exactly on the corner, and I was practically stringing my wires across to the cross-corners from that, diagonally; but on the other two corners were two Bell Telephone Company's poles carrying about three armsful of wires. It might be about thirty wires, something like that, and I had to cross over them and about three feet, I think about that, our wires extended perhaps higher, and then on the other side of them, perhaps six feet out farther, these Bell wires were about twenty feet from the pole, I think, I am not sure, and about six feet on the other side of them the Light and Power Company's arc light wires were running parallel with those Bell wires, and beyond those were one or two guy wires that were helping to hold up these poles on the corner, and underneath of all those the trolley wire ran parallel with the street running up the hill, running right along the center of the street in the same direction with the street, and I had to throw the rope I had in the first place over the top of all these

wires, because our wires were higher than any of those, and I had to brin up over everything and clear all. Q. You were right in there mixed up am the wires? A. Yes, not way up, but so my head and shoulders were on a l with the first armful of wires."

He knew his clothes were wet, and that damp clothes, da weather, damp anything was more likely to attract electricity, s he knew what a live wire was, and that a wire that is charged w electricity, whether light or heavy, is a live wire, and he kn that every one of the wires he was going up among was a teleph wire and in constant use and was charged with electricity. " Before you commenced to string this wire on Saturday afterno and when you got up your pole, you could see all the dangers t were there, you could see every wire, and you were above trolley wire, you could see the electric light wire, you could see the wires there, could you not? A. Yes. Q. You knew tl were there before you commenced work? A. Yes, sir. Q. Wl did you first learn that it was dangerous to cross a trolley w with these telephone wires? A. I always understood it was d gerous to cross any highly charged electrical wires. Q. What you mean by always understood? You mean ever since you co menced the business at all? A. Ever since I can remembe have understood it was unsafe to handle highly charged wires. How long since you found out that it was dangerous when cross wires that you must be careful not to touch those wires with wires you were stringing? A. I have taken it for an understo fact. I cannot remember the date. Q. It has been an und stood fact with you ever since you first commenced the busine A. Yes. Q. When you started out with your card to install t telephone, you knew how to install it, did you not? A. Yes, s Q. And you knew the system of crossing electric light wires a trolley wires? You knew the system by which that was don A. Yes. Q. You took the chances? You knew what you ha A. Yes, I knew what boy I had, I knew what wire I had, and knew what rope I had, and I knew the danger of crossing tl wire. Q. You could see this danger? A. No, sir. Q. Y could see that trolley wire? A. I could see the danger of a chan of dropping that wire. Q. You could see the danger if he drop it? A. Yes, sir. Q. You knew if he did drop it what result would be? A. No, sir."

Plaintiff further testified that he instructed Henry Werner

hold onto the wires: "Explained to him that if the wires, after I had drawn them along a little ways, if they were allowed to lie loose, they would go down onto the Bell wires, which we were instructed to not interfere with in any manner, and also down onto the trolley, which would have, of course, spoiled our work, because it would burn our wires, and cause us to do it all over again, or spoil some of the Bell phone wires by crossing the wires. I instructed him that if any strong electric shock came through there, and he would get it by hanging onto the wires, to step back onto the tar sidewalk, and he would, in my opinion, insulate himself completely, because it was a very dry, hot day. After I told him that, I proceeded up the road with the end of the rope, and went to the pole with it and pulled the rope over hand over hand in order to to get the wire to me, and cautioned Henry Werner several times to be very careful, and not to let the slack of the wire down onto the trolley. I think we were about fifteen feet above it when we kept the wire up tight. Q. At the time you gave the boy instructions, what had you principally in mind? What was your purpose in warning him? A. Why, I thought on account of crossing over so many wires, and the trolley wire and everything else, of course, I supposed we were runing the chance of dropping it onto those wires, and I thought he might get a sound or something and imagine he was badly hurt, and drop the wires, and then we would have to do all the work over again, if they dropped down onto the trolley wires, and the trolley might burn our wires in two because our wires passed over the pole and onto the ground, and it would burn and ground our wires so we would have to do our work all over again, and it might spoil some of the Bell phone wires and phones. Q. What would it do to you if that boy let those lines sag so it would strike the trolley wire? What would happen to you? A. I had no idea at that time. I thought I was well insulated by being upon this dry cedar pole. Q. You were right in there mixed up among the wires? A. Yes, not way up, but so my head and shoulders were on a level with the first armful of wires. Q. Did you know at that time how those wires were grounded? A. No. Q. Did you know you were in any danger from those wires at all? A. No, I did not have the least idea."

One of defendant's experts testified that, in his judgment, plaintiff got in the most dangerous position in doing his work that he

could, except to lie on the cross-wires, and that, unless he w trying to commit suicide, plaintiff had little apprehension of t danger that he was in, and that he should judge he was whol incompetent to do that kind of a job, or was incapable of appreci ing the danger. Plaintiff also testified that this was the fi telephone wire he ever ran. It was the first job the company ev gave him to take and do alone, and it was the first time he ev went out to string a wire of any length, never ran one as far this, had only done this kind of work working with other me never had charge of a similar job before, and had never app ciated any danger. He understood that if a wire touched t trolley wire up in the air it would have been charged with el tricity from the trolley wire, but he thought at the time, if he we insulated from the ground, he could not be affected by electrici in the trolley wire, because the other electricity is in the ra themselves, and he did not think it could hurt him; that he d not know that there could not be a live wire without its bei grounded. He did not know that if the wire touched the grou and touched the trolley wire it was grounded and would hit hi and had no idea that touching the ground would affect him. I did not know at the time how the wires were grounded, but learned afterwards. He learned afterwards that they led back the central office and were there connected with the ground. I knew nothing about it at the time. He did not have the least id that he was in any danger from those wires that touched his boc He was ordered to have this job finished without fail by Saturd night, and had worked about a day and a half when he was hu through the wire in some way getting away from Werner, t assistant, and falling upon the trolley wire and the ground, ca ing him quite serious injuries.

5. There was an abundance of testimony to justify the tr judge in submitting to the jury the question whether it was t duty of defendant to have furnished the plaintiff with a sufficie quantity of insulated wire, and whether it discharged such du

1. Even if the evidence were undisputed that the wire fell up the trolley wire through the negligence of plaintiff's fellow serva Werner, this fact would not have authorized the instruction of verdict, since an employee may recover for the negligence of l employer although the negligence of a fellow servant contrib

to the injury. *Lockwood v. Tennant,* 137 Mich. 305, 100 N. W. 562.

2. Whether the plaintiff's method of drawing two wires across at once was more unsafe than to draw them across one at a time was, upon this record, a question of fact for the jury.

3. The trial judge did not err in refusing to instruct a verdict on the ground that the uninsulated wire was not the proximate cause of the injuries. *Swick v. Ætna Portland Cement Co.*, 147 Mich. 454, 111 N. W. 110; *Logan v. Railway Co.*, 148 Mich. 603, 112 N. W. 506; *Warren v. St. Elec. Ry. Co.,* 9 Am. Electl. Cas. 527, 141 Mich. 298, 104 N. W. 613; *S. W. Teleg. & Tele. Co. v. Robinson,* 4 Am. Electl. Cas. 342, 50 Fed. 810, 1 C. C. A. 684, 16 L. R. A. 545.

4. Assumed risk:

This raises the really serious question in the case. The principles underlying the doctrine of assumed risk were examined at some length in *Bradburn v. Railway Co.,* 134 Mich. 575, 96 N. W. 929. It was there said:

> "The doctrine of assumed risk applies, and is limited in its application, to dangers which the employee either actually knows or should know." *Harrison v. Detroit, etc., Ry.*, 137 Mich. 78, 100 N. W. 451.

In *Ragon v. Railway Co.,* 97 Mich. 265, 56 N. W. 612, 37 Am. St. Rep. 336, it was said:

> "The master has a right to expect him to be alert to inform himself of existing conditions, and he cannot attack the master from the shelter of unjustifiable ignorance of the business, machinery, and methods which he is employed to use. Actual ignorance will not alone suffice to charge a master. Ignorance must also be excusable."

In *Foley v. Jersey City Elec. Light Co.,* 54 N. J. Law, 411, 24 Atl. 487, it was said:

> "The immunity of the master rests upon the contract of hiring. The master says to the servant: 'You understand fully the nature of the employment and the dangers attending it; will you enter upon it?' The servant says: 'I accept it.' And the law implies that he accepts it with all the risks incident to it without regard to the magnitude of the danger."

It is the general rule that the doctrine of the assumption of obvious risks applies as well to those which arise or become known to the employee during the employment as to those in contemplation at the original hiring. 26 Cyc. 1180; *Kean v. Detroit Copper*

A. 990, that:

"It is not merely the physical surrou
obvious to him in order that he may be h
therefrom, but it must be obvious to him
servant under the circumstances, that t
Smith v. Car Works, 60 Mich. 501, 27 N.
v. Lake Superior Smelt. Co., 123 Mich. 4
Am. St. Rep. 215.

And when there is a possible p
is not assumed, the trial judge can
the ground that such risk was assu
172 Mass. 324, 52 N. E. 503.

Davis v. Engine & Thresher (
1125, is quite similar in principl
case the plaintiff's regular emplo
machine shop, but, needing a man
who looked after the electrical w
defendant, defendant had selecte
addition to his regular duties. D
ing a regular electrician in rewir
same, and had had some two or t
the injury which resulted in his
that contact with a live wire was c
been called at one time to a flash c
to a water tank tower with whic
accidentally came in contact. Th
knew the extent of the current, a
their brief.

wiring around the premises for some time, but he was not a lineman, nor did he profess to be, and seems to have been ignorant of the precautions which should have been taken in crossing live wires with another wire which might form a ground connection; but Davis had no knowledge of this ignorance, and it only developed on the trial."

Davis, after crawling with the wire he was to string under the electric light wires, "attempted to walk westerly on the south side of the east and west gable, and as he did so he seems to have slipped, as the testimony puts it, and, either to save himself from falling, or thoughtlessly, he took hold of the electric wire with his hand. In the other hand he held the bell wire, the coil of which Riggs had on his arm standing on the ground, which formed a complete ground connection. The electric current passed from the wire through his arm and body, and down this wire into the ground, and killed him instantly." The ruling of the circuit judge directing a verdict was affirmed on the ground that the plaintiff had assumed the risk. Referring to *Smith v. Car Works* and *Ribich v. Lake Superior Smelt. Co., supra,* the court said:

"In each of these cases the injured party was ignorant of any danger of injury. In none of them was it held that it is the duty of the master to foretell the exact extent of the injury likely to follow any negligence of the warning of danger. This is never precisely known in the case of an obvious danger. If deceased knew that contact with this wire would cause him severe injury, he had sufficient warning. This is all the most expert could have known in advance, and there can be no doubt on this record that deceased knew this."

It is apparent, from the testimony of the plaintiff himself, that he fully understood the danger of contact with the trolley wire or the electric lighting wires; but it is insisted on his behalf that he did not know that he would come in contact with the trolley wire in case the wire which he held in his hand fell upon it; that he supposed that he was insulated by being upon the dry cedar pole, and did not know that the live telephone wires which were in contact with his body were grounded; or that, if the wire he was stringing got away from his helper and fell upon the ground, that would create a circuit through his body. As to whether the plaintiff actually had knowledge of what constituted a grounding of himself or of the telephone wires, and as to whether he was ignorant of the fact that he was not insulated while in his position upon the pole, were questions of fact for the jury. As to whether plaintiff's lack of knowledge was justifiable or not presents another

question. We think it must be held that it was not. It was s by the court, in *Chisholm v. New Eng. Tel. & Telegraph Co.,* Mass. 125, 57 N. E. 383, that "the danger from an imperfe insulated wire is the most characteristic risk which a lineman to encounter. That general risk the deceased assumed by enter upon his employment." So in this case the danger from cont with the highly charged wires, which, in a city the size of A Arbor, in view of modern conditions, plaintiff was likely to h to pass over with the wires of defendant, was a characteristic r and the principal risk which he was likely to have to encoun Contact with the highly charged wires might be formed and most likely to be occasioned by other means than seizing hold said wires, and we think it was implied in the contract of hir plaintiff as a lineman that he knew those things with refere to the creating of grounds and circuits which a telephone linen must necessarily know in order to conduct his business with degree of safety whatever to himself, his employer, or his employees.

We also think it must be held that knowledge of the ground of defendant's telephone wires was such an essential fact in th business that the plaintiff, who had worked in their employ "troubleman," lineman, groundman, and otherwise for ove year, must be charged with constructive notice of such fact. is argued, however, that, regardless of his knowledge, actual constructive, of the negligence of his employer and the dan involved in consequence thereof, he is protected by the rule t the employee does not assume the risk of dangers arising thro the negligence of the employer. While the rule is well settled does not apply in cases where the negligence and the result danger are discovered by and known to the employee before en ing upon the performance of the work. To hold otherwise wo be to apply to cases like the present the rule which is only plicable in cases where the risk grows out of the violation by employer of statutory provisions for safeguarding employ *Swick v. Cement Co.,* 147 Mich. 454, 111 N. W. 110.

The judgment is reversed, and a new trial ordered.

MONTGOMERY, CARPENTER, and MCALVAY, JJ., concur GRANT, C. J., concurred in the result.

PETERS v. LYNCHBURG, ETC., LIGHT CO.

Virginia Supreme Court of Appeals — June 11, 1908.

108 Va. 333, 61 S. E. 745.

1. SHOCK FROM INCANDESCENT LIGHT — NEGLIGENCE — EVIDENCE — RES IPSA LOQUITUR. — In an action against an electric light company to recover for injuries sustained by a shock from an incandescent light, it appeared that the defendant had neither ownership nor control of the electrical appliances on the plaintiff's premises. The house was wired by the owner under the inspection of the city electrician. Experts who examined the premises agreed that excessive voltage could only have been transmitted into the building by one of two means — either by the transformer being out of order, or by a crossing of the secondary wire of higher voltage — neither of which conditions was found to exist; but the experts expressed their opinion that the accident was due to the fact that the brass on the light bulb protruded from the socket in such a way that, when the light was on, the upper end of the brass was in contact with the wires in the socket. This theory was sustained by the evidence. *Held*, that the plaintiff had failed to establish actionable negligence and that the doctrine of *res ipsa loquitur* did not apply.
2. SAME — RES IPSA LOQUITUR. — The doctrine of *res ipsa loquitur* rests upon the assumption that the thing which causes the injury is under the exclu-

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INJURIES FROM SHOCK RESULTING FROM CONTACT WITH INCANDESCENT LIGHTS.

1. In General.
2. Defective Transformer.
3. Death or Injury of Employees.

1. In General. — A person, using incandescent lights and having no control over the electric light company's appliances, cannot be charged with liability for their defective condition; and it is not negligence for such person to use a brass socket, such sockets being in universal use. *Martinek v. Swift & Co., ante*, 117 Ia. 671, 98 N. W. 477. No recovery can be had against a lighting company for injuries resulting from shock from an incandescent light, where the plaintiff's violation of a city ordinance contributed to the accident. *Brunnelle v. Lowell Electric Light Corp., ante*, 74 N. E. 676. Where plaintiff was injured by shock from a defective incandescent lamp upon the premises of a third party, who knew of the defect and continued to use the lamp, it was held that the intervening agency of the third party saved the electric light company from liability. *Griffin v. Jackson Light and Power Co.*, 7 Am. Electl. Cas. 657.

Plaintiff's wife, taking hold of the wire or metal socket of an electric lamp in her house, in the act of lighting it, received a fatal shock. There was evidence of a grounded primary wire and of conditions rendering it possible for the current to pass around instead of through the transformer; neither of which alone could, but both together might, have caused the deadly current to enter the house, resulting in the death in question. It was held that the question of defendant's negligence was proper for the jury. *Alton Railway and Illuminating Co. v. Foulds*, 7 Am. Electl. Cas. 548, 81 Ill. App. 322.

Horsley, Kemp & Easley, for

Opinion by WHITTLE, J.:

The declaration in this case,
defendant is an electric light
Lynchburg and engaged in the
to the citizens of that city for li
the defendant negligently suffe
tricity to remain upon its wires
ing; (2) that it negligently pern
conducting electricity into the
its other wires, thus carrying a
therein; and (3) that it negliger

As to death from shock caused by
light wire to arc light wire, see *Predm*
App. Div. 551, 91 N. Y. Supp. 118.
through light company's wire or throug
v. Buffalo & N. F. E. L. & P. Co., ante,

2. Defective Transformer. — De
descent light due to defective transform
Lighting Co., ante, 26 R. I. 427, 59 A
Schmitt, ante, 123 Ill. App. 647; *Mang*
Co., ante, 122 Ky. 476, 91 S. W. 703;
ante, 27 Ohio Cir. Ct. R. 517; *Morhar*
353, 98 N. Y. Supp. 124. Evidence th
a reputable manufacturer is insufficie

dition a suitable transformer to reduce the voltage of electricity carried by its primary or high tension wires, so as to transmit a safe current to its secondary or low tension wires leading into the dwelling. And, as the proximate result of these several acts of negligence, it is charged that the plaintiff, in turning off an incandescent light in his kitchen, received a shock from the overcharged wire, which occasioned the injury for which he demands damages of the defendant.

The trial court entered judgment for the defendant on a demurrer to the evidence, to which ruling the plaintiff brings error.

The defendant had neither ownership nor control of the electric appliances on the plaintiff's premises. The house was wired by the owner, under the inspection of the city electrician, and the wiring and electric equipment were his property. The two experts who examined the premises to discover the cause of the accident are agreed that excessive voltage could only have been transmitted into the building by one of two means — either by the transformer being out of order, or by a crossing of the secondary wire of higher voltage — neither of which conditions was found to exist. On the contrary, the testimony of both these experts (one introduced by the plaintiff and the other by the defendant) shows that, in their opinion, the accident was due to the circumstance that the brass on the light bulb protruded from

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Adm'r v. Louisville Electric Light Co., ante, 122 Ky. 476, 91 S. W. 703. As to what constitutes notice to electric light company of the presence of a dangerous current on its secondary wires, see *Goddard v. Euzler, ante,* 222 Ill. 462, 78 N. E. 805.

In the case of *Sauers v. Stevens Manufacturing Co.,* 196 Mass. 543, 82 N. E. 694, an action was brought for the death of an employee caused by a shock from an electric lamp. It appeared that the deceased, pursuant to orders from his employer, went into the defendant's cellar to remove a rat from a bleaching vat and while there received a fatal shock from an electric lamp which he was using. It was held that the question as to the defendant's negligence as to the assumption of risk by deceased was properly submitted to the jury. In the case of *Union Light, Heat & Power Co. v. Arntson,* 157 Fed. 540, an action was brought against an electric light company for the death of an employee of a patron of said company resulting from a shock from an incandescent light. It appeared that the defendant's transformer was out of order, that the defendant had been notified of the defect, that another employee had received a shock to the knowledge of deceased and that an expert of the defendant had examined the wires. A verdict for the plaintiff was sustained and it was held that the question of the deceased's negligence was properly submitted to the jury.

the socket in such a way that, when the light was on, the up end of the brass was in contact with the wires in the socket. Th theory is sustained by the incident that one of them (Kent, plaintiff's witness), while holding the bulb in his hands, with p of his hand touching the protruding rim on top of the lar stepped on a piece of zinc under a range connected with the wa tank and pipes running into the ground; and the short circuit tl formed caused the electricity to pass through his body into ground. The shock was shown to be so severe that it burnt finger, and he jerked loose and threw the lamp from him. that connection it also appeared that the plaintiff himself h taken the light bulb in question from another room and placed in the kitchen socket, to which it was unsuited.

To sustain a recovery, the plaintiff relies chiefly on the doctr of *res ipsa loquitur,* and calls special attention to the case *Alexander v. Nanticoke Light Co.,* 9 Am. Electl. Cas. 188, 2 Pa. 571, 58 Atl. 1068, 67 L. R. A. 475. There is, howev obvious dissimilarity in the facts of the two cases. In the out the opinion in the Pennsylvania case states:

> "The premises of the appellant . . . were lighted by electricity. electric light was furnished by the appellee, an electric light company. had wired the store and cellar of the plaintiff, furnished the electric lam and made and maintained the connections. . . . He went into his cellar show goods to a customer, and while handling, in the usual way, an ordin incandescent light bulb, suspended from the ceiling by a flexible exten cord, was severely shocked and seriously injured. From the facts submit it appeared that, when he was shocked, the electric wires on his premises w charged with a higher voltage than they should have carried, but the ca of this was not shown to have been any specific negligence of the defenda

The court held, upon the foregoing premises, that the presur tion was that the company was negligent.

The differentiating features between the Pennsylvania case a the case in judgment are the presence in the former case, a absence in the latter, of excessive voltage on the lighting wir and the further fact that in the former case the light compa wired the plaintiff's store and cellar, furnished the electric lam and made and maintained the connections, while in this case wiring was done, and the electric outfit was owned, installed, a controlled, by the proprietor of the premises.

In the case of *Scott v. London Dock Co.,* 3 H. & C. (Com.

R. U. S. 134), ERLE, C. J., with respect to the application of the doctrine of *res ipsa loquitur*, observes:

"There must be some evidence of negligence. But when the thing is shown to be under the management of the defendant or his servants, and the occurrence is such that as in the ordinary course of things does not happen if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the occurrence arose from want of care."

The doctrine rests upon the assumption that the thing which causes the injury is under the exclusive management of the defendant, and the evidence of the true cause of the accident is accessible to the defendant and inaccessible to the person injured. *Ross v. Double Shoals Cotton Mill,* 140 N. C. 115, 52 S. E. 121, 1 L. R. A. (N. S.) 298; Greenleaf on Ev. (Wigmore), § 2509; 1 Shear. & Red. on Neg., § 59.

The decisions of this court accord with the foregoing principles.

In *Richmond, etc., Co. v. Rubin,* 9 Am. Electl. Cas. 138, 102 Va. 809, 47 S. E. 834, the company suffered its trolley wire to sag and come in contact with the plaintiff's phone wire, and was held responsible for a fire traceable to that cause.

So, in *Norfolk R., etc., Co. v. Spratley,* 9 Am. Electl. Cas. 329, 103 Va. 379, 49 S. E. 502, and *Lynchburg Tel. Co. v. Booker,* 9 Am. Electl. Cas. 406, 103 Va. 594, 50 S. E. 148, the injuries, for the infliction of which the companies were held answerable in damages, were occasioned by broken wires owned and exclusively controlled by the defendants, and negligently left by them in or near the streets.

But the doctrine of *res ipsa loquitur* can have no application where the accident is due to a defective appliance under the management of the plaintiff; nor to a case involving divided responsibility, where an unexplained accident may have been attributable to one of several causes, for some of which the defendant is not responsible.

From the standpoint of a demurrer to the evidence, the plaintiff has failed to establish actionable negligence against the defendant; and the judgment of the trial court, which so holds, must be affirmed.

Affirmed.

MAYFIELD WATER & LIGHT CO. ET AL. v. WEBB'S ADM'R.

Kentucky Court of Appeals — June 20, 1908.

111 S. W. 712.

INJURY TO CHILD BY CONTACT WITH ELECTRIC WIRE — TRESPASSER ATTR TIVE NUISANCES. — In an action to recover for the death of a child cau by coming in contact with an electric light wire while climbing a guy w it appeared that the electric wire was eighteen feet from the street a that the guy wires up which the deceased climbed extended from the of the pole at an angle of forty-five degrees. *Held*, that such a guy w was not a dangerous instrumentality, attractive, or alluring to childr that the company should not be required to anticipate that child would climb to the wires and get hurt, and that the deceased in this c was a trespasser.

Appeal by defendants from a judgment for plaintiff. *Revers*

Robbins & Thomas, for appellant Mayfield Water & Light (

W. B. Stanfield, for appellant telephone company.

Attractive Nuisances. — In *Consolidated Electric Light & Power Co. Healy*, 8 Am. Electl. Cas. 548, 65 Kan. 798, 70 Pac. 884, the syllabus by court is as follows: "It is the law of this State, that one who maintains his premises what is called an 'attractive nuisance' (that is, a place whi though patently dangerous to those of ordinary knowledge and prudence, so enticing to others excusably lacking in intelligence and caution as induce them to venture to it) is liable for resulting injuries to the latt and the same rule applies to one who maintains on his own premises dangerous instrumentality, not in itself attractive, but placed in such i mediate proximity to an attractive situation on the premises of another as form with it a dangerous whole, notwithstanding the attractive situation the other premises may not be of itself dangerous." In the above case it v held that the laying of electric wires over a city viaduct constituted attractive nuisance.

The fact that a public bridge and the piers thereof and the immedi surroundings rendered a place attractive to children, does not render an elect lighting company liable for injuries received by a boy coming in contact wit live wire while climbing over the bridge. *Graves v. Washington Water Pou Co., ante*, 44 Wash. 675, 87 Pac. 956. But the habit of small boys to cli trees filled with branches reaching almost to the ground is a habit whi corporations stretching their wires over such trees must take notice *Temple v. McComb City Electric Light & Power Co., ante*, 89 Miss. 1, 42 S 874.

The doctrine of attractive nuisances is not applicable where boys accustom to play beneath a sidewalk where an electric company maintained a defectiv insulated cable were injured by contact with the cable. *Commonwealth El tric Co. v. Melville, ante*, 210 Ill. 70, 70 N. E. 1052.

W. J. Webb, Webb & Seay, and *Weaks & Weaks,* for appellee.

Opinion by HOBSON, J.:

The Mayfield Water & Light Company maintains a system of electric lights in Mayfield. It erected along College Cross street a line of poles eighteen feet high, and at the top of the poles on a cross arm it placed two electric wires twenty inches apart and eighteen feet from the ground. After this had been done, the Home Telephone Company put up a line of poles along the street thirty feet high, and on these poles it placed wire cables containing its telephone wires. At the intersection of Sixth street, the telephone poles turned in Sixth street, and to keep its pole straight at this point it attached two guy wires to the top of the pole and ran them out to a deadman, or log, buried in the ground; the guy wires running down from the top of the pole at an angle of about forty-five degrees being about four feet apart at the ground and coming together at the top of the pole. The guy wires passed in about eight inches of the electric wire. The children of the neighborhood would hold on to the upper guy wire with their hands and walk on the lower wire, and then slide down, using the wires to play upon. Charles M. Webb, a little boy eleven years old, was playing upon the wires in this way, when his head touched the electric wire, thus completing the circuit, and he was instantly killed. This suit was brought against both the electric light company and the telephone company to recover for his death. A recovery was had in the Circuit Court for $1,000, and the defendants appeal.

There was proof on the trial that the insulation on the electric light wire was defective, and there was also proof that, whatever the condition of the insulation might have been, the result would have been the same when the little boy's head touched it while he was standing on the other wire which ran into the ground; the proof being that the insulation will not protect from injury when such a high current of electricity is carried as was used on this wire. The ground upon which the recovery is rested is that in the construction of the wires they were made attractive and inviting to children, and that the defendants were guilty of negligence in so maintaining the wires and permitting them to remain in this dangerous and unprotected condition. This court has in a number of cases held electric light companies responsible where it per-

water. The plaintiff, walking upon the lot in the night for a purpose of his own and without right, fell into the vat of hot water and was burned. It was held that he could not recover. In *Schauf's Adm'r v. City of Paducah,* 106 Ky. 228, 50 S. W. 42, 90 Am. St. Rep. 220, a little boy wading out into an open pond on the property of the city to catch a bird got over his depth and was drowned. It was held that there could be no recovery. Other authorities are collected in these opinions. The tendency of the more recent cases is to restrict, rather than enlarge, the application of the principle laid down in what are called Turntable Cases, and to hold that the defendant is not liable unless he knows, or ought in the exercise of ordinary care to know, that his structure is alluring to children and endangers them. See note to *Barnes v. Shreveport R. R. Co.,* 49 Am. St. Rep. 416–426. In *Harris v. Cowles,* 38 Wash. 331, 80 Pac. 537, 107 Am. St. Rep. 847, a child was injured by a revolving door at the entrance to a building; the door being similar to those in common use in winter to keep out the cold. It was held that the trespasser, though a child of tender years, could not recover, on the ground that to extend the rule would be to impose a burden upon the property owners that would be unreasonable. The same principle was applied in *Fitzmaurice v. Connecticut R. R. Co.,* 78 Conn. 406, 62 Atl. 620, 112 Am. St. Rep. 159, where a child was burned at a pile of hot ashes left upon the defendant's premises, and in *Foster-Herbert v. Cut Stone Co.,* 115 Tenn. 688, 91 S. W. 199, 4 L. R. A. (N. S.) 804, 112 Am. St. Rep. 881, where a child climbed into a low wagon and was there hurt.

As long as electric light wires are not put under ground, they must be put upon poles, and, where they are placed above the street as high as eighteen feet, the company should not be required to anticipate that children will climb up to the wires and get hurt. Guy wires are necessary on high poles at street corners where the line turns. A guy wire placed on a high pole to keep it in place, or some such contrivance, cannot well be dispensed with. Such a wire is not a dangerous instrumentality, attractive or alluring to children within the meaning of the Turntable Cases. The little boy was a trespasser upon the defendant's wire, and, being a trespasser, he cannot complain that the premises were unsafe. Children, no less than adults, when they trespass upon

the property of another, take the risk unless the circumstanc bring the case within the principle of what is known as the Tur table Cases, where a dangerous instrumentality is maintained, wi knowledge, actual or constructive, that it is alluring to childr and endangers them. A wire eighteen feet above the groun which can only be reached as this wire was, cannot be said to fa within the exception to the general rule.

Judgment reversed, and cause remanded for further proceedin consistent herewith.

OTHER 1907 CASES NOT REPORTED IN FULL.

1. Injury to Passengers. (1-2.)
2. Injury to Motorman from Explosion of Controller. (3.)
3. Injury to Conductor by Escaping Electricity. (4.)
4. Death of Horses from Electric Shock. (5-6.)
5. Death of Telephone Lineman from Electric Shock. (7.)
6. Sale of Franchise by City for Electric Lighting. (8.)
7. Wiring of Buildings, Regulation by City. (9.)
8. Injury from Lightning Entering Building over Telephe Wires. (10.)
9. Feed Wires, Right of Street Railway to Maintain. (11.)
10. Taxation of Gross Receipts of Electric Company. (12.)
11. Nuisance. (13.)
12. Eminent Domain — Public Business — Interference with Nav gable Waters. (14.)
13. Establishment of Lighting Plant. (15.)

1. Injury to Passenger Who Sat on Sand Box on Front Platfor of Crowded Car, Caused by Passenger Jumping from Car on B coming Frightened at Explosion in Controller — Negligence — Co tributory Negligence — Instructions. — In the case of *Williamson v. Louis Transit Co.*, 202 Mo. 340, 100 S. W. 1072, it appeared that plaintiff young woman, boarded one of defendant's street cars in company with so friends, and owing to the crowded condition of the car, took a seat on sand box just behind the motorman on the front platform of the car. S eral other persons were on the platform at the time. As the car was movi along, an explosion occurred in the controller box, with a loud report, a flames issued therefrom, and plaintiff was burned by the heat. The mot man jumped from the car, and, in consequence thereof, and of the fri which plaintiff experienced by reason of the explosion, she, too, jumped fr the car, and was permanently and seriously injured. Plaintiff recovered judgment. Defendant appealed, and contended that plaintiff's instructi No. 1 was erroneous, as it did not submit to the jury one of the affirmat defenses; that is, plaintiff's negligence in voluntarily riding on the fr platform of the car and taking a seat upon the sand box. The court sa "As to this contention, it may be said that, under the facts and circumstan disclosed by the record, the crowded condition of the car, etc., the plaint

was not guilty of negligence in riding on the front platform of the car and sitting on the sand box. Nor is there any evidence to show that plaintiff's knowledge and experience regarding the operation of electric cars, or dangers incident to riding on the front platform thereof and sitting on the sand box, were such as to give her any ground for apprehending any danger from the position she occupied on the car. The negligence was on the part of those in charge thereof, in not providing her a seat within the car, or warning her of the dangerous position she occupied, if dangerous they knew it to be. The instruction must have been understood by the jury as requiring the plaintiff to be free from contributory negligence during the whole of the time she was voluntarily riding upon the car, as well as at the time she jumped therefrom. But, even if it did not present the question of contributory negligence on the part of plaintiff, it was 'no more than nondirection, not misdirection, and was not error in a civil case.' *K. C. & N. C. Ry. Co. v. Shoemaker*, 160 Mo. 425, 61 S. W. 205. If defendant desired to have that question passed upon by the jury, it should have asked for an instruction thereon, which it did not do."

Defendant further contended that its instruction No. 5 followed accurately the evidence, and that the court amended it to its prejudice. This instruction, as offered, told the jury that, if the previous explosions had not been of such violence as to actually endanger passengers riding upon the front platform of the car upon which such explosions may have occurred, it was not negligence on the part of defendant to permit plaintiff to ride upon the platform of this particular car. The court amended said instruction by inserting, immediately after the word "occurred," these words: "And were not of such a character as to excite and frighten passengers on such front platform, whereby they would be likely to jump off of such car while in motion." It was held that the amendment was proper. The court said: "The instruction, as asked, entirely ignored that which everybody is presumed to know — and that is, that such an explosion, under the same circumstances, would alarm passengers in proximity to it, and, in all probability, cause them to become panic-stricken and to jump from the car in an effort to escape from the apparent danger — and it makes no difference even though the previous explosions might not have been of such a character as to actually endanger passengers riding under similar circumstances, for it is just as culpable to negligently frighten a passenger, and thereby cause him to jump from the car and injure himself, as it is to injure him directly. And this is true, although no injury would have resulted had no attempt to escape been made. *Bischoff v. Railroad*, 121 Mo. 216, 25 S. W. 908; *McManus v. Railroad*, 116 Mo. App. 110, 92 S. W. 176; *Ephland v. Mo. Pac. R. R. Co.*, 137 Mo. 187, 37 S. W. 820, 38 S. W. 926, 35 L. R. A. 107, 59 Am. St. Rep 498; *McPeak v. Mo. Pac. R. R. Co.*, 128 Mo. 617, 30 S. W. 170."

Judgment for plaintiff affirmed.

2. Injury to Passenger in Stepping on Electrified Plate in Car — Presumption of Negligence — Burden of Proof — Sufficiency of Pleading as to Negligence. — In the case of *McRae v. Metropolitan St. Ry. Co.*, 125 Mo. App. 562, 102 S. W. 1032, it appeared that plaintiff became a passenger on one of defendant's cars on a day when it was thawing, and the soles of her shoes had become wet from water and slush in the streets. As she entered the vestibule she stepped on a metal plate and received a slight shock from electricity. The conductor, who was standing near the rear door, then cautioned her to "step high," but, observing no obstacle in the

way, she proceeded to enter through the doorway, and, in doing so, stepped on a metal plate at the threshold. According to her testimony she received from this contact an electric shock of great severity, as a result of which her lower limbs were partially paralyzed, her nervous system deranged, and she was otherwise injured permanently. On the part of defendant it was conceded in the testimony that the metal plate from which plaintiff claims to have received the severe shock was charged with electricity, and that fact was known to the conductor at the time she entered the car. It is also admitted that she stepped on the plate and received a shock therefrom, but it is claimed that it was mild, and the medical witnesses introduced assert that it could not have produced the injurious effects claimed by her. At the end of the run the car was put out of service for examination and repairs, and the inspection which followed disclosed that mud had collected between one of the wires used in the transmission of power to the machinery and the underside of the car, in a way to afford a good conductor of electricity between the wire and the screws which served to fasten the plate. On demurrer, it was held that the evidence was sufficient to show that plaintiff's injuries were a direct result of the shock. On appeal from judgment for plaintiff, it was held that demurrer was properly overruled.

Objection was made by defendant to a charge given in the instructions asked by plaintiff that, "if the jury believe from the evidence that plaintiff received an electric shock while a passenger on said car (if you believe she was a passenger thereon), the presumption is that this shock was occasioned by some negligence of the defendant, and the burden of proof is cast upon the defendant to rebut this presumption of negligence, and establish the fact that there was no negligence on its part." As to this the appellate court said: "Counsel argue that 'negligence on the part of the carrier cannot be presumed from the fact of an accident and an injury to a passenger' (*Yarnell v. Railway*, 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599), and that 'to say that the defendant is bound to excuse his fault before he is shown to have been guilty of one is nonsense' (6 Thompson on Negligence, section 7637), and finally, 'where the accident is to the passenger and not to the train, no presumption of negligence on the carrier's part can arise.' *Citing Thomas v. Railway*, 148 Pa. 180, 23 Atl. 989, 15 L. R. A. 416; *Keller v. Railway*, 149 Pa. 65, 24 Atl. 159; *State (Bernard) v. Railway* Co., 60 Md. 555; *Railway Co. v. State*, 71 Md. 599, 18 Atl. 969. The first of these two propositions we concede without comment. As to the other, the principle invoked is somewhat inaccurately stated. No presumption of negligence on the part of the carrier arises in cases where the passenger is injured by some cause wholly disconnected from the operation of the vehicle in which he is riding. Thus, if he is injured by a missile projected from outside of the vehicle, the carrier cannot be held liable except on the showing that the injury was the result of some negligent act connected with the transportation. The carrier is not an insurer of the safety of the passenger, and is liable only for injuries inflicted by its negligence, and the burden of proof always is on the passenger to establish the fact of the carrier's negligence by evidence. But, where the passenger shows that his injury was caused by some breaking of machinery, a collision, derailment of cars, or something improper or unsafe in the conduct of the business or in the appliances of transportation, he needs go no further, since from any such happening a presumption of negligence on the part of the carrier arises. *Thomas v. Railway, supra; Clark v. Rail-*

way, 127 Mo. 197, 29 S. W. 1013; *Goodloe v. Railway*, 120 Mo. App. 194, 96 S. W. 482; *Bowlin v. Railway* (decided at this term), 102 S. W. 631. The conceded facts demonstrate that the shock was caused by a defective condition of one of the appliances of transportation. The existence of a highly electrified metal plate in the passageway for passengers constituted such a defect, and the burden was cast on defendant to show that its presence could not have been detected and prevented by the exercise of the highest degree of care. The instruction under consideration correctly enunciated the rule applicable to the facts of the case."

Finally, it was urged that the petition failed to allege any act of negligence on the part of the defendant. It was charged that "as plaintiff was passing over the floor of the rear vestibule of said car toward the doorway thereof, in the usual and ordinary manner for the purpose of taking a seat in said car, she received a severe electric shock which injured her as hereinafter more fully described, * * * that said shock was caused by the negligence of the defendant in that said car and said car line were negligently constructed, maintained, and operated by the defendant, and said shock was the result of such negligence." As to this contention the court said: "Not only is the allegation sufficient after verdict, but it could not have been successfully attacked either by demurrer to the petition or by motion to make more definite and certain. It is not required of a passenger who is injured by some casualty to the vehicle or by some defect in the appliances used in the transportation to allege the specific act of negligence which brought about the casualty. The averment that he was injured by a collision, derailment, breaking down of vehicle, or by a defect in a given appliance, coupled with a general allegation of negligence, is enough to state a cause of action."

The judgment was affirmed.

3. Injury to Motorman by Explosion of Controller — Duty of Master to Furnish Safe and Suitable Machinery — Presumptive Negligence. — In the case of *Beebe v. St. Louis Transit Co.*, 206 Mo. 419, 103 S. W. 1019, it appeared that plaintiff, a motorman on one of defendant's street cars, was thrown from his car and injured by an explosion of the controller.

The evidence showed that the controller boxes in use by defendant on its cars on the date when plaintiff was injured were what are known as the "General Electric" or "Westinghouse" controller boxes, and that they were at the time of the accident the best on the market. While there was expert testimony tending to show that any foreign substance in the controller, such as dirt, water, or grease, might produce arcking, that is, a slight flash or explosion, which might be prevented by inspection, there was no evidence of a failure by defendant to inspect the controllers in use as often as was seemingly necessary.

The case was submitted to the jury upon the theory that a case of negligence was made out against the defendant if the jury should believe from the evidence that the defendant had failed to use reasonable care in procuring and using a reasonably safe controller, or that the defendant had failed to exercise ordinary care to inspect the controller which was in fact procured, when by the exercise of reasonable care in making inspections defendant might have discovered the dangerous condition, if it was dangerous. There was a verdict for plaintiff and defendant appealed from the judgment entered thereon.

It was held, first, that, as defendant procured the best controller on the market, it was not negligent in this respect. The court said: "The master is not required to furnish his servant absolutely safe appliances or machinery with which to work, but discharges the full measure of his duty towards his servant when he exercises ordinary and reasonable care to supply and maintain safe machinery, tools, and appliances with which to do the master's work. *Minnier v. Sedalia*, 167 Mo. 99, 66 S. W. 1072; *Glasscock v. Swaferrs Dry Goods Co.*, 106 Mo. App. 657, 80 S. W. 364; *Holmes v. Brandenbaugh*, 172 Mo., loc. cit. 64, 72 S. W. 550; *Tabler v. Railway Co.*, 93 Mo. 79, 5 S. W. 810; *Grattis v. Railway Co.*, 153 Mo. 403, 55 S. W. 108, 48 L. R. A. 399, 77 Am. St. Rep. 721. This duty, however, does not make the master an insurer of the safety of the servant. *Grattis v. Railway Co., supra.*"

It was further held that plaintiff failed to make out a case on the ground of the defendant's negligence in maintaining the controller in a defective condition and in failing to discover and correct that condition. It was asserted by plaintiff that "the expert proof affirmatively indicates the cause of the explosion to be the defective condition of the controller and want of necessary inspection to reveal and to correct that condition; that the duty resting on the master was not performed in this case, according to the positive evidence, even beyond the reasonable inferences to be drawn from the facts of the explosion and its deadly force; that circumstantial evidence of the cause of such an explosion or injury as here appears is sufficient, and it need not exclude every other possible hypothesis."

The court said: "We are unable to agree that the expert proof affirmatively indicates the cause of the explosion to be the defective condition of the controller, or the want of necessary inspection. These were facts which it devolved upon plaintiff to prove, or to prove a state of facts from which they might reasonably be inferred. *Delahunt v. Tel. Co.*, 215 Pa. 241, 64 Atl. 515, is relied upon by plaintiff as sustaining his position; but in that case there was positive evidence of defendant's negligence in permitting its wire, which was not properly insulated, to come in contact with the wires of another company, heavily charged with electricity, whereby the electric current was conveyed to the telephone of the deceased when he was making proper and lawful use thereof, and in consequence of the negligence of the defendant company deceased received a heavy shock of electricity and was killed. It is true that in *Grimsley v. Hankins* (D. C.), 46 Fed. 400, it is held that a steamboat boiler explosion, causing injuries, is *prima facie* evidence of negligence on the part of the owners and officers; but it is also held that this may be rebutted by evidence showing due diligence in supplying suitable machinery. From the evidence in the case at bar it is indisputable that the controller was of the best. In the case of *Excelsior Electric Co. v. Sweet*, 57 N. J. Law, 224, 30 Atl. 553, the general rule is held to be that the occurrence of the accident does not raise the presumption of negligence, but when the testimony which proves the occurrence by which a person is injured discloses circumstances from which the defendant's negligence is a reasonable inference a case is presented which calls for a defense. In our view, there were no circumstances disclosed by the evidence in this case from which negligence on the part of the defendant, either in the selection of the controller or the inspecting of it, can reasonably be inferred. Another case relied upon by plaintiff is *Rose v. Stephens et al.* (C. C.), 11 Fed. 438. That was a suit by a person who was injured by the explosion of a steam boiler

used by the defendant to propel a vessel chartered by the defendant to be used for the transportation of passengers and freight. It was held, when an accident happens as by the bursting of a boiler, in the absence of explanatory circumstances negligence will be presumed, and the burden is cast upon the owner to disprove it. In discussing the same subject in the case of *Transportation Company v. Downer*, 78 U. S. 129, 20 L. Ed. 160, it is said: 'There was no presumption, from the simple fact of a loss occurring in this way, that there was any negligence on the part of the company. A presumption of negligence from the simple occurrence of an accident seldom arises, except where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible.'

"The rule announced in these cases only applies when the affair speaks for itself. 'It is not that, in any case, negligence can be assumed from the mere fact of an accident and an injury; but in these cases the surrounding circumstances which are necessarily brought into view by showing how the accident occurred contained, without further proof, sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof of negligence that the injured person is able to offer, or that it is necessary to offer. The accident, the injury, and the circumstances under which they occurred, are in some cases sufficient to raise a presumption of negligence, and thus cast upon the defendant the burden of establishing his freedom from fault. In the words of Baron Channell, 'where it is shown that the accident is such that its real cause may be negligence of the defendant, and that whether it is so or not is within the knowledge of the defendant, the plaintiff may give the required evidence of negligence without himself explaining the real cause of the accident, by proving the circumstances, and thus raising a presumption that, if the defendant does not choose to give the explanation, the real cause was negligence on the part of the defendant.' Shearman & Redfield on Negligence (4th ed.), § 59. In *Tuttle v. C., R. I. & P. R. R. Co.*, 48 Iowa, 236, it is said: 'It is true that, where a dangerous accident occurs which, under ordinary circumstances, would not have happened had the defendant and its employees exercised due care, prudence, and watchfulness, proof of such an accident, with its attendant circumstances, raises a presumption of negligence, and the burden of proof is then cast upon the defendant to rebut this presumption. To this end defendant must show that in the selection and operation of the machinery which caused, or contributed to, the accident it used due care, prudence, skill, and watchfulness. This is as far as, upon any well-recognized legal principle, the burden of proof can be cast upon the defendant, and is as far as any adjudication, to which we have been referred, has gone.' This rule, however, has no application to the case at bar, for the reason that plaintiff alleges in his petition specific acts of negligence on the part of the defendant, in that 'the dangerous and defective condition of said machinery which exploded could have been discovered by defendant by ordinary care in inspecting said controller prior to its explosion in ample time to have prevented said explosion.' This question was submitted to the jury by plaintiff's instruction, and thus plaintiff assumed the burden of establishing the allegations by the petition. *Dowell*

v. Guthrie, 116 Mo. 646, 22 S. W. 893; *Yarnell v. Kansas City, Ft. Scott & M. Ry. Co.*, 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599.

"The general rule is that the burden rests upon the plaintiff to prove the negligence of the defendant as alleged in the petition, and that such negligence was the proximate cause of the injury. 'In other words, negligence is not presumed, but must be proved. The difficulty of proving the negligence charged does not affect the principle.' 6 Thom. on Law of Neg., § 7695; *Miller v. Railway Co.*, 186 Pa. 190, 40 Atl. 413. We are firmly of the opinion that the doctrine of '*res ipsa loquitur*' is not applicable to the facts in this case. This, we think, is clearly demonstrated by the opinion of the St. Louis Court of Appeals in the case of *Breen v. St. Louis Cooperage Co.*, 50 Mo. App. 202. Judge Rombauer, speaking for the court, said: 'In *Jones v. Yeager*, 2 Dillon (U. S.) 68 (Fed. Cas. No. 7,510), the injury was the result of a boiler explosion. Judge Dillon, after briefly stating the well-known rules of law governing the master's liability in such cases, charged the jury as follows: 'In the application of these principles to the evidence, you will first inquire whether the boilers in this case were unsafe or unfit for use, and, if so, whether the defendant knew it, or as a reasonable man, having a due regard for the safety of his employees, ought to have known it, for, if he ought, his neglect in this respect would be equivalent, in imposing liability, to actual knowledge; and in the next place you must inquire, and, in order to hold the defendant liable, must find from the evidence, that this defect was the direct and immediate cause of the accident, without which it would not have happened, and, if you thus find, then the defendant would thus be liable.' That charge was given in a case where there was ample evidence tending to show that the boiler which burst was weak and worn, and expert evidence tending to show that it burst owing to such weakness. This clearly shows that the rule of *res ipsa loquitur* cannot be applied with any sense of reason to a case of complicated machinery, nor can the jury, from the mere fact that some defect exists in some part thereof, conjecture not only that such defect was the direct and immediate cause of the accident, but also that it was the duty of the defendant to foresee such conjectural result and guard against it. The employer fulfils his duty by guarding against the probable result of defects, even if such defects are shown. Holding him responsible for conjectural results shifts his liability from the ground of negligence to that of insurance.

"I have examined many cases on this subject but find none sufficiently analagous in its facts to the present case to furnish a precedent of any value. Touching the law there is very little difficulty, but touching its application to the particular facts in this case the difficulty is great. That it is not for the defendant to account for the accident on a theory consistent with due care, but for the plaintiff to account for it on a theory inconsistent therewith, all the cases concede. That such theory must not rest upon bare conjecture, but must rest either upon direct proof, or upon proof of facts establishing a direct and immediate connection between the defects and accident complained of by logical inference, is equally conceded. The cases which probably come nearer in their facts to those of the present case are *Searles v. Railroad*, 101 N. Y. 661, 5 N. E. 66, and *Dobbins v. Brown*, 119 N. Y. 188, 23 N. E. 537, in both of which verdicts were set aside on appeal as resting not on legitimate inference, but on bare conjecture. In the first, the cause of the injury was a cinder which had lodged in the plaintiff's eye. Judge

Earle, in delivering the opinion of the court, said: 'Where the fact is that the damages claimed in an action were occasioned by one of two causes, for one of which the defendant is responsible, and for the other of which it is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause, and he must fail also if it is just as probable that they were caused by one as by the other, as the plaintiff is bound to make out his case by a preponderance of evidence. The jury must not be left to mere conjecture, and a bare possibility that the damages were caused in consequence of the negligence and unskilfulness of the defendant is not sufficient.' In the second case the cause of the accident was the precipitation of the plaintiff's intestate from a bucket while descending a mine. The evidence showed that the cable attached to the bucket was broken after the accident, but there was no evidence how it came to be broken. RUGER, C. J., in delivering the opinion of the court, said: 'The trial court, in its charge to the jury, authorized them to infer that the accident might have happened from the accidental stoppage of the dummy yoke or follower at some point in the course of its descent, and its sudden fall thereafter, from a great distance, on the bucket. Any inference that the accident happened in the manner suggested would, it seems to us, have been substituting conjecture for proof, and violates the rule requiring proof always to be made the basis of recovery.' In *Callahan v. Warne*, 40 Mo. 136, Judge Holmes says: 'Negligence is something invisible, intangible, and, for the most part, incapable of direct proof, like sensible facts or physical events. It is, in general, a matter of inference from other facts and circumstances which admit of direct proof, and which may raise a presumption of the truth of the main fact to be proved. These facts and circumstances must be such as would warrant a jury in inferring from them the fact of negligence by reasoning in the ordinary way, according to the natural and proper relation of things and consistently with the common sense and experience of mankind.' In *Smith v. Railroad*, 37 Mo. 292, the same judge says: 'It is not enough that a part of the facts involved in the injury are made to appear. The whole issue must be proved, and the burden of proof is upon the plaintiff. If he failed to prove the whole issue, he comes short of making out a *prima facie* case, and the jury should be instructed to find a verdict for the defendant.'

"That the controller in question was a very complicated piece of machinery is clearly shown by the evidence, and brings the case squarely within the principles announced in the next preceding case. The evidence shows that any one of numerous causes might have brought about the explosion, among which causes was the accumulation of dirt in the controller. Such dirt might have gotten into the controller at any time while the latter was in charge of the plaintiff while on the track without any fault or negligence on the part of defendant, and the explosion have occurred before defendant had any opportunity to inspect the controller, so that the cause of the explosion was purely theoretical and conjectural, and no judgment should be permitted to stand with no foundation whatever for its support." Judgment for plaintiff reversed.

4. Electric Railway Companies — Injury to Conductor by Escaping Electricity — Presumption of Negligence — Pleadings. — In the case of *Miller v. Chicago and Oakpark Elevated Railroad Company*, 132 Ill. App. 41, an action was brought by a conductor to recover for injuries from

escaping electricity. The court said: "The amended declaration avers that the trains were operated by means of a highly dangerous and destructive agency, to wit, electricity; that the engine and motor car were equipped with certain mechanical appliances and fixtures for the transmission and conducting of such electricity in the propelling, operation, and management of the train. It is further averred that, while plaintiff was engrossed in the work of his employment as a conductor, without knowledge of the danger surrounding him, and while acting with due care and caution for his own safety, the defendant carelessly, wrongfully, negligently, and improperly failed and omitted to provide and maintain adequate guards, controllers, means, or appliances for controlling or confining the electricity in use in such manner as to prevent its escaping from the machinery and from being precipitated against and coming in contact with plaintiff, and that by means of such failure to do the things specified, the electricity escaped from the machinery, came in contact with plaintiff, striking him with great force and power, burning him, etc.

"A failure on the part of the defendant to use some device sufficient, in the exercise of due diligence to guard against the escape of electricity powerful enough to injure the plaintiff, tends, unexplained and unexcused, to impute to defendant a lack of ordinary care, from which a presumption of negligence arises. *Com. Elec. Co. v. Melville*, 210 Ill. 70. Plaintiff was not required to charge knowledge of the defective condition to defendant.

"The amended declaration is not obnoxious to a general demurrer, and we regard it as invulnerable against the special demurrer interposed. The duty of the master to the servant to furnish a safe place in which to work is sufficiently inferable from the averments of the amended declarations, as also a breach of this duty resulting in injury to its servant.

"The judgment is reversed and the cause remanded to the Superior Court, with directions to overrule the demurrer to the amended declaration, with a rule on the defendant to plead thereto."

5. Electric Railways — Death of Horses from Breaking of Trolley Wire — Evidence — Presumption of Negligence. — In the case of *Patterson Coal and Supply Co. v. Pittsburgh Railway Co.*, 37 Pa. Superior Ct. 212, an action was brought against a street railway company to recover for the death of two horses which had been killed while being driven along a public highway by the falling of a trolley wire. At the trial the plaintiff produced evidence that the horses were being driven by their servant along the public highway, that they had a double track street railway along the highway, and the road being narrow, the horses drawing a heavy wagon were being driven along one of the railway tracks, and that the trolley wire suddenly broke and fell upon the horses, the electric current killing both of the horses within two minutes. This was the only evidence as to the circumstances of the accident or the cause which produced it. There was no evidence offered to show negligence in the construction, inspection, or repair of the trolley wire or its attachments, and if negligence could be imputed to any person under the evidence it had to be inferred from the mere fact that the trolley wire fell.

The court below gave binding instructions in favor of the defendant, and the plaintiff appealed. The court said: "The question raised by this specification of error is, ought the jury to be permitted to infer negligence upon the part of the street railway company upon evidence that merely establishes

that a trolley wire broke without more? The general rule undoubtedly is that negligence must be affirmatively proved, and is not, in the absence of a contract relation between the parties, to be inferred, from the mere happening of an accident. The present chief justice said, in *Oil Company v. Torpedo Company*, 190 Pa. 350: 'The maxim *res ipsa loquitur* is in itself the expression of an exception to the general rule that negligence is not to be inferred but to be proved affirmatively. The ordinary application of the maxim is limited to cases of absolute duty, or an obligation practically amounting to that of an insurer. Cases not coming under one or both of these heads must be those in which the circumstances are free from dispute and show, not only that they were under the exclusive control of the defendant, but that in the ordinary course of experience, no such result follows as that complained of.' This rule prevails even where a party is engaged with an element naturally dangerous. *Smith v. Electric Light Co.*, 198 Pa. 19; *Fitzgerald v. Edison Electric Illuminating Co.*, 8 Am. Electl. Cas. 584, 200 Pa. 540; *Aument v. Pa. Telephone Co.*, 9 Am. Electl. Cas. 605, 28 Pa. Super. Ct. 610. There is no necessity for an extended discussion of the question raised by this record, which has been considered by the Supreme Court and determined adversely to the contention of the appellant, in a case which arose under almost similar circumstances. *Kepner v. Traction Co.*, 183 Pa. 24."

6. Death of Horse Attached to Fire Engine by Contact with Live Wire — Proximate Cause. — In the case of *Eagle Hose Co. v. Electric Light Co.*, 33 Pa. Super. Ct. 581, an action was brought by a fire engine company against an electric light company to recover damages for the death of a horse from contact with a live wire in the street. A nonsuit was granted, and on the appeal of the plaintiff from an order refusing to take off the nonsuit, the court said: "On March 6th, 1903, in response to a fire alarm signal given through the defendant company's plant, the plaintiff responded to a call by taking a number of its members on its hose truck, drawn by two horses, to a three-story frame hotel building, then on fire in the near vicinity. On their arrival they passed along a public street under an electric arc lamp, which was then hanging in its place suspended on a mast or arm nine feet long attached to a pole and placed on the opposite side of the street and forty feet distant from the building on fire. After passing a short distance under the light, the driver was directed to return to the other side of the light to enable the firemen to properly discharge their duties, and, as stated by the driver of the wagon, 'as soon as I turned around to come back the lamp fell,' and by other witnesses it was shown that when he was within fifteen feet of the lamp it fell to the ground. The heat from the burning building was so intense that it burned the rope which held the arc lamp in place at the end of the arm, and severely scorched the pole. The arm on which the arc lamp was suspended remained in place. The driver did not notice the fall of the arc light, and in his effort to get the team in a proper position one of the horses stepped on the live wire attached to the arc lamp and was instantly killed. This action was brought to recover damages for the loss of the horse, the negligence alleged being that the defendant company improperly and unsafely secured the arc lamp to the arm, it being suspended by a hemp rope, and not supported by clutches or any other safe or proper appliance. At the end of the trial the court granted a nonsuit upon the ground that the proximate cause of the injury was the burning of the rope, due to a casualty

which the defendant was not reasonably bound to foresee, and that the evidence failed to disclose that either the use of the clutch described was anything more than experimental in that locality at the time in question — it was clearly the duty of the defendant company to adopt the best precaution against danger in general use, of which experience has shown to be effectual, and to avail themselves of every such known safeguard or generally approved invention so as to lessen the danger to persons lawfully using the highway, * * * the fire may be considered to be an independent agency over which the company had no control, and that without its effect the lamp would not have fallen, * * * while the burning building may be treated as an inevitable accident so far as the defendant company is concerned, in that they were not in any manner identified with the cause of the fire and had no control over it, it may at least be treated as an intervening agency which brought into dangerous prominence that which the jury might find was a negligent act of the defendant, and so combined with it as to cause the plaintiff damage. * * * The precautions which were reasonably necessary to protect the arc lamp in its place, and whether the company failed to adopt an appliance which was recognized as safer than the one he had had in use, and was well known to be of such a character, and in general use in the community prior to the happening of this accident, was a question for the jury. Whether the use of such appliance was purely experimental, and was not recognized as an accepted precaution and safety appliance was for the jury as well. Under the facts in the case it was error to enter nonsuit."

7. Telephone Companies — Death of Lineman from Electric Shock — Proximate Cause. — In the case of *Hartenstine v. United Telephone and Telegraph Company*, 219 Pa. 95, 67 Atl. 989, an action was brought against a telephone and telegraph company by a widow to recover for the death of her husband from an electric shock. The court said: "At the time the husband of the appellant was killed by an electric shock he was helping to string wires for the appellee. He was employed as a reel-man. A wire from his reel and that from one alongside of it were fastened to a running board to which a rope was attached. This running board kept the wires apart and prevented their twisting as they were carried over the arms of the poles. When a pole was reached, a lineman carried the rope up to the cross-arm and threw it down on the other side. The man on the ground would then carry the rope forward, pulling the wires to the cross-arm, and when the running board reached a cross-arm the man on the pole would fasten it on the pegs, so as to keep wires back of him tight. Slack wires in the rear might have sagged and come in contact with heavily charged electric wires beneath them. The wires of the appellee were being strung six or eight feet above heavily charged wires belonging to another company — the Pottstown Light, Heat and Power Company. These lower wires were on some of appellee's poles. Before the deceased and his fellow workman began to string wires, they were all instructed to keep them taut, to prevent their touching the highly charged wires beneath them. The principal witness for the plaintiff so testified. According to the finding of the jury, the wires of the appellee, which were being reeled off, were allowed to sag at a certain point and touched the dangerous wires, carrying a deadly current to the deceased, whose hand was on the wire at the reel. The verdict was for the plaintiff, but judgment was entered for the defendant, *non obstante veredicto*, and from it there is this appeal."

It was held that the proximate cause of the death of the intestate was not the omission to furnish him with rubber gloves, but the negligence of fellow employees. The court said "if the wires had been strung in a safe and proper manner, as they could have been strung with the rope supplied by the appellee, there would have been no need to insulate the hands of the reel-man, for no current could have got on the reel he was unreeling. The appellee, having supplied sufficient rope to enable the workmen to safely string the wires, had a right to assume that they would do so."

Assignment of error overruled and judgment for the defendant affirmed.

8. Municipal Corporations — Ordinances — Sale of Franchise for Electric Lighting. — In the case of *Stites v. Norton et al.*, 125 Ky. 672, 101 S. W. 1189, an action was instituted by a citizen and taxpayer of the city of Louisville against the board of public works of said city to enjoin the board from selling at a public sale a franchise or privilege to string and maintain wires along the streets of the city for distributing and selling electricity. It was held that the city had the power to provide by ordinance that the board of public works should not consider any bid made by a lighting company which already held the only existing franchise in the city.

9. Municipal Corporations — Regulation of Wiring of Buildings for Electric Lighting. — In the case of *Collins v. District of Columbia*, 30 App. D. C. 212, the plaintiff was granted a writ of error to review the judgment of the Appellate Court convicting him of putting electric wires in a house without first obtaining a permit therefor. The evidence tended to show that the plaintiff in error made application to the inspector for permission to introduce electric wires into the house occupied by him as tenant in order to instal and operate an electric motor. This was returned to him to obtain the signature of the owner of the house, in the meantime he put up the wire from the basement. It was held that his installing the wires pending his application for a permit, in violation of the municipal regulation, rendered him liable. It was also held that the importance and necessity of guarding against fires and their communication to adjacent buildings in towns and cities, having always been regarded as within the police power, that a municipal regulation covering the wiring of buildings was a reasonable exercise of such power. Judgment of Appellate Court affirmed.

10. Lightning Transmitted into Building over Telephone Wires — Failure of Company to Supply Ground Wire — Injuries. — In the case of the *Southern Bell Telephone & Telegraph Company v. Parker*, 119 Ga. 721, 47 S. E. 194, an appeal was taken by the defendant from a judgment in favor of the plaintiff. The court said: "The plaintiff below, Roy Parker, brought suit against the Southern Bell Telephone & Telegraph Company in the Superior Court of Macon county, and in his petition set forth the following allegations: The defendant company is a corporation duly chartered under the laws of Georgia, and had and operated on the 2d day of April, 1901, a line of telephone wires and telephones in said county for the use of the public and for hire, and also had on that day, and still has, in that county, an agent for the transaction of its business. Plaintiff is a merchant and is engaged in business in the town of Oglethorpe, Ga. Prior to the 2d day of April, 1901, the defendant company placed one of its telephones in plaintiff's store, at his instance and request, for use in his business; he having paid therefor the usual charges. This telephone was negligently, carelessly, unskilfully, and

unscientifically placed in his store by said company, in this: that said company neglected and failed to attach and connect a ground wire to said telephone, and also neglected and failed to attach and equip the telephone apparatus with the necessary and usual appliances to prevent injury and damage from lightning or electricity, all of which was usual and necessary for the safety of one using the telephone. Plaintiff applied to the agent of the company to have the aforesaid appliances attached and placed and connected with the telephone in his store, and gave warning of the dangerous condition in which the telephone had been left by the company; but, notwithstanding this notice and warning that the telephone was incomplete and dangerous, the company continued to neglect to attach the necessary appliances to render the use of the telephone safe, and thus prevent injury to persons near the same at all times. On April 2, 1901, the plaintiff, while standing about four feet distant from the telephone, was suddenly struck by a volt of electricity transmitted and conveyed over said telephone wires to this telephone, and from it to him, by which volt of electricity plaintiff was knocked senseless to the floor, and from the effect of which he remained unconscious for a considerable time. For several days his suffering was so intense as to require him to have medical attention; the shock to his entire system was so severe as to leave him partially paralyzed; and although some ten months had elapsed since his injuries were received, he had not fully recovered from the effects of said shock, continued to suffer from his injuries, and feared that they might prove permanent. By reason of the aforesaid gross negligence on the part of the defendant company, he had been damaged in the sum of $1,900, for which amount he prayed judgment against it. A verdict of $807.08 was properly rendered for plaintiff. Judgment affirmed.

11. Franchises — Right of Street Railway to Maintain Feed Wires over Streets in Which It Had No Right to Operate Railway. — In the case of *Williams v. Old Colony St. Ry. Co.*, 193 Mass. 305, 79 N. E. 484, an action was brought to restrain the defendant from maintaining poles and wires in one of the city streets and to compel the removal of the same. Statutes under which the defendant obtained its power and authority to operate a street railway construed and held that the defendant, with the consent of the city authorities, might maintain its feed wires over streets in which it had no right to operate a railway.

12. Taxation — Electric Light Companies. — In the case of *City of Scranton v. Scranton Electric Light & Heat Co.*, 33 Pa. Super. Ct. 431, it was held that the power delegated to municipalities to collect license taxes, even for revenue purposes, could not be construed to include a tax upon gross receipts, and that a city of the second class had no power to levy a tax upon the gross receipts of an electric light and power company.

13. Nuisances — Transmission of Electricity. — In the case of *Mull v. Indianapolis & C. Traction Company*, 169 Ind. 214, 81 N. E. 657. it was held that the transmission of electricity at a high voltage for lawful purposes did not constitute a nuisance *per se*.

14. Eminent Domain — Public Business — Interference with Navigable Waters. — In the case of *Minnesota Canal & Power Co. v. Pratt et al.*, 101 Minn. 197, 112 N. W. 395, an action was brought by the plaintiff to condemn certain lands necessary for the construction of works designed and intended for the generation of electric power for distribution to the public

for the purpose of light, heat and power. The following is the syllabus by the court:

"Rev. Laws 1905, § 2841, authorizes certain corporations to condemn such private property as may be necessary or convenient for the transaction of the public business for which they may be formed under such statute. *Held*, that the term 'public business,' as so used, includes the construction of works for supplying the public with water, light, heat, and power.

"Rev. Laws 1905, §§ 2841, 2842, 2926, 2927, conferring the power of eminent domain on public service corporations for specified purposes, authorizes the exercise of such power in aid of the construction of canals and reservoirs to be used to create and distribute electric power for general public use.

"A public service corporation, although authorized to condemn private property for the construction of canals and reservoirs for the generation of electric power, may not exercise such power when the particular enterprise contemplates an interference with the navigable capacity or navigation of any of the navigable waters of the state, unless such interference is expressly authorized by statute.

"Where a public service corporation was organized to furnish water, light, heat, and power for public use, and, being authorized to exercise the power of eminent domain, became subject to State regulation and control, the actual exercise of the State's power to regulate and control such corporation did not constitute a condition precedent to the use of its power of eminent domain; the State being authorized to pass such regulatory measures as the future business of the corporation might require.

"Where a public service corporation was authorized to furnish water, light, heat, and power for public and private use, it was not necessary that it should have first obtained a franchise from a municipality or a contract to furnish a city or village with its products before it was entitled to exercise its power of eminent domain, conferred by Rev. Laws 1905, §§ 2841, 2842.

"In a proceeding to condemn land in aid of an enterprise which requires the construction of dams, reservoirs, and canals for the purpose of creating a water power with which to generate electric power for public use, the petition for the appointment of commissioners alleged facts which, if true, justify the conclusion that the works, when completed, would not materially interfere with the navigation of the waters to be affected thereby. Motions by various landowners to dismiss the petition were treated by the trial court as demurrers. *Held* that, assuming the allegations of the petition to be true, the contemplated use of the public navigable waters is not forbidden by the laws of the State."

15. Establishment of Lighting Plant. — In the case of *Lighthipe v. City of Orange et al.*, 75 N. J. L. 365, 68 Atl. 120, the plaintiff brought certiorari to review certain ordinances and other municipal proceedings of the defendant. The court in writing the syllabus said:

"Where the review by the Supreme Court of ordinances and other municipal proceedings requires the investigation of questions of fact, the power of the court to inquire into such matters of fact exists as a part of the constitutional jurisdiction of the court, and is not dependent for its existence upon the certiorari act. P. L. 1903, p. 346, § 11; P. L. 1906, p. 658.

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Where a decedent knew of the dangerous condition of a telephone box, that its wires crossed electric light wires, no recovery can be had for his death therefrom. Citizens' Telephone Co. *v.* Westcott's Adm'x 950

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Death from contact with broken telephone wire fallen across an electric light wire. United Electric Light & Power Co. of Baltimore *v.* State, etc. 416

Where a telephone wire is broken by a storm and falls across an electric light wire which has become grounded by the falling of a tree from the effects of the same storm, the liability of the owners of the respective wires depends upon the negligence in the construction and maintenance of the wires, where the injury occurs immediately after the falling of the wires. Heidt *v.* Southern Tel. & Tel. Co. 435

Telephone wire fallen across defectively insulated electric light wire, *held* electric light company negligent in not insulating and protecting its wires. Commonwealth Electric Co. *v.* Rose..... 381

Injury to infant from contact with a telephone wire, charged from a light wire, the telephone wire having been hung on the side of a house near the ground by a house mover. Nagle *v.* Hake..... 218

Where a telephone company maintained a guy wire in such a position that it became crossed with an electric light wire, and the guy wire broke and decedent came in contact with it in an open field, it was held that the telephone company was under a duty to exercise care, even if decedent was a trespasser as between himself and the landowner. Guinn *v.* Delaware & A. Telephone Co.... 552

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A lineman injured by shock from a telegraph wire which had become charged by crossing an electric light wire cannot recover from the telegraph company, it having no knowledge that the wire was dangerous. Martin *v.* Citizens General Electric Co..... 769

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An electric railway lineman *held* to have assumed the risk of injury while assisting in the adjustment of a cable on the arm of a pole erected for that purpose. Meehan *v.* Holyoke St. Ry. Co. 2

Where trouble shooter was ordered by chief electrician to shake certain wires and was thereby injured, *held*, that the question of assumption of risk was for the jury. Chicago Sub. W. & L. Co. *v.* Hyslop 10

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A telephone lineman, who was not an inspector, and who was not familiar with a converter and fuse box placed on the poles by a lighting company, cannot be held to have assumed the risk. Barto *v.* Iowa Telephone Co. 1

The dangerous proximity of electric light wires to telephone wires is an extraordinary risk and therefore not assumed by a lineman of a telephone company, unless he knew and comprehended the danger. Drown *v.* New England Tel. & Tel. Co. 10

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An award of $3,250 for the loss of the entire thumb of plaintiff's left hand and the loss of the index finger of his right hand by contact with electric wire was not excessive. Bernier *v.* St. Paul Gaslight Co. 125

In an action to recover for injuries sustained by a child from contact with a live wire in a public place, it was held that a verdict of $3,750 was not excessive. Colorado Springs Electric Co *v.* Soper. 887

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In an action for breach of contract to deliver electric power the minimum of damages must be the procurement from another of that which the defaulting party failed to deliver. Terrace Water Co. *v.* San Antonio L. & P. Co. 505

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An action of ejectment will lie where the soil is not touched, but part of the space a few feet above the soil is occupied by an electric wire unlawfully strung by the defendant above the plaintiff's premises; the sheriff can physically remove the wire. Butler *v.* Frontier Telephone Co. 922

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The same degree of care should be exercised by an electric light company to protect the inmates of a house from injury to which it is furnishing light, as is used to safeguard the public from wires in the highways. Denver Consol. Electric Co. *v.* Walters. 1013

An electric light company, furnishing current for lighting buildings, is bound to exercise a high degree of care to protect persons using such current. Morhard *v.* Richmond L. & R. R. Co. 687

An electric light company must exercise the highest degree of care in connecting wires to buildings, where it is reasonably probable that they will be accessible to children. Denver Consol. Electric Co. *v.* Walters 1013

Electric light company having left a wire running to a house after the lights have been cut off, such wire being within a few feet of the ground, is liable for injuries to a child by coming in contact with such wire although the child be a trespasser. Daltry *v.* Media L., H. & P. Co. 63

A company transmitting a dangerous electric current to a converter placed near a balcony, owes a duty to any one lawfully using the balcony to take reasonable care to prevent the escape of the current. Brooks *v.* Consolidated Gas Co. 35

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Death of lineman of telegraph company from an electric shock while working on a pole supporting many wires. Memphis Consol. Gas & Electric Co. *v.* Bell 1025

Whether a shock was a concurrent and efficient cause of a lineman's fall was a question for the jury, where it appeared that he may have slipped. Commonwealth Electric Co. *v.* Rose 381

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Injury from electric light wire in street, which had been broken by a heavy limb falling upon it. Spires *v.* Middlesex & Monmouth Electric Light, H. & P. Co 40

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In an action to recover for death caused by shock received from a tree wire which had become charged owing to a defective insulator between a span wire and an electric light, it was held that the light company was negligent in not remedying such defect. Wilbert *v.* Zurheide Brick Co 771

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In an action to recover for death caused by shock from incandescent light, it appeared that the electric light company had leased its plant; *held,* that under the evidence the lessees liability was a question for the jury. Crowe *v.* Nanticoke Light Co 195

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An electric light company cannot be held liable for shutting off current where customer has made dangerous connections and failed to remedy same on notice. Benson *v.* American Illuminating Co. 961

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Where a motorman was killed while removing a trolley pole on top of the car from its socket by reason of its coming in contact with high tension wire, it was held that he assumed the risk knowing the relative localities and distances of trolley poles and wires and their dangerous possibilities. Harrison *v.* Detroit Y. A. A. & J. Ry. Co. 152

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In an action against a street railway company for injuries to a horse resulting from contact with defendant's trolley wire in the street, it was held that a *prima facie* case was perfected by showing that the trolley wire was down. Cleary *v.* St. Louis Transit Co. 236

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An electric light company may, under the power of eminent domain, enter upon the bed of a turnpike road, and string its wires, notwithstanding the objection of abutting owners who owned a fee in the bed of the road. Brown *v.* Radnor Township Electric Light Co. 305

WHEN TAKING LANDS FOR GENERATING ELECTRIC POWER IS FOR PUBLIC USE.

The generation of electricity by water power for distribution and sale to the general public on equal terms, subject to governmental control, is a public enterprise and property so used is devoted to public use. Minnesota Canal & Power Co. *v.* Koochiching Co. 708

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WHEN TAKING LANDS FOR GENERATING ELECTRIC POWER IS NOT FOR PUBLIC USE —

Manufacturing, generating, selling, distributing, and supplying electricity for power for manufacturing or mechanical purposes, is not a public use for which private property may be taken. State ex rel. Harris et al. *v.* Superior Court of Thurston County..... 931

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An electric light and power company, having no franchise to enter certain cities, and under no obligation to furnish current to any person, is not authorized to take private property. State ex rel. Tacoma Industrial Co. *v.* White River Power Co. et al..... 605

IMMEDIATE POSSESSION WHEN ORDERED —

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Where the vendor of electric current puts an end to a contract he is estopped from denying that the vendee has not been damaged to the extent of his actual loss. Terrace Water Co. *v.* San Antonio L. & P. Co..... 505

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In action for death of lineman from defectively insulated wires, evidence held sufficient to support verdict for plaintiff. Paducah Ry. & Light Co. *v.* Bell's Adm'r..... 404

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In order to recover for injuries to a horse by contact with a live rail the plaintiff must prove: (1) That the injury to the horse was by an electric current; (2) that the electric current came from the railway track of the defendant; (3) that the current so came by reason of the negligence of the defendant. Wood *v.* Wilmington City Ry. Co. 477

APPLIANCES IN USE BY OTHER COMPANIES —

Comparative merits of various insulators may be shown in order to prove that a certain insulator was a proper and safe one. North Amherst Home Tel. Co. et al. *v.* Jackson. 607

CONDITION OF APPLIANCES AFTER ACCIDENT —

Evidence relating to the condition of wires shortly after an accident, and as to the condition of a guy pole two months after, *held* admissible. Smith *v.* Missouri & K. Telephone Co. 455

Evidence of a defendant electric light company that it examined certain wires after an accident therefrom is not admissible in an action for injuries. Goddard *v.* Enzler. 869

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Evidence as to custom of electric light and telephone companies to have man take care of wires when a building is moved, *held*, incompetent where the witness had not shown that this was a general custom. Nagle *v.* Hake. 218

Evidence that plaintiff's employer and other employees had notice that the defendant desired to cut the wires or that it was the custom, is incompetent in an action by a painter to recover damages for injuries caused by contact with defectively insulated wire while painting building. Baries *v.* Louisville Elec. Light Co. 111

Evidence of general custom of other electric light companies to use uninsulated wires of high voltage was inadmissible in contravention of a municipal regulation. Clements *v.* Potomac Electric Power Co. 938

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Evidence of customary use of guard wires for the purpose of preventing contact between trolley wires and other wires held admissible in action for shock from trolley wire in contact with light wire. Mahan *v.* Newton & B. St. Ry. Co. 508

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In action by telephone lineman to recover for injuries received from an electric light wire, it was held that evidence as to the insula-

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tion of other wires than those in use by the electric light company was properly excluded. Zuhn *v.* United Electric Light & Power Co. 813

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Evidence that the insulation on defendant's wires was defective at other points and on other occasions than at the point of contact where the accident happened held inadmissible. United Electric L. & P. Co. of Baltimore *v.* State, etc..... 41[illegible]

Evidence that, owing to defective insulation elsewhere, electricity escaped from the wires of defendant company at another point and time held inadmissible. North Amherst Home Tel. Co. et al. *v.* Jackson..... 60[illegible]

Where a horse was injured while crossing the track of an electric railway by reason of an electric shock, plaintiff was entitled to offer evidence to show by continued series of accidents that other horses had received similar shocks by stepping on the tracks of such company at other places on its line. Vicksburg Railway & Light Co. *v.* Mile..... 78[illegible]

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Statement of manager of telephone company, made after an accident, that the wire with which a boy came in contact belonged to his company, *held*, admissible. Lynchburg Telephone Co. *v.* Bokker. 40[illegible]

Evidence of statements made by an electric company's foreman, who had control of the electric wires and appliances, and whose duty it was to inspect the same, to the effect that a transformer was of old style, etc., was admissible in an action against an electric company for injuries. City of Austin et al. *v.* Nuchols. 93[illegible]

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An electrician of seventeen years' experience may properly be asked whether precautions were necessary in repairing broken electric wires. Jacksonville Electric Co. *v.* Sloan..... 891

An electrical engineer may testify as to the voltage carried by electrical wires, and as to the effect of contact between wires. Nagle *v.* Hake..... 218

In an action for injuries received while painting a pole by reason of certain electric wires being defectively insulated, expert evidence as to how long before the plaintiff's injury the defect in the insulation of the wires occurred was admissible. Bernier *v.* St. Paul Gaslight Co..... 125

Whether or not the proper method has been adopted in installing and maintaining electric wires in a building is a matter which may be shown by expert testimony. German-American Ins. Co. *v.* N. Y. Gas & E. L., H. & P. Co..... 446

Opinion of an expert as to whether or not deceased received an electric shock before he fell held admissible. Martin *v.* Des Moines Edison Light Co..... 654

In action against an electric light company for death resulting from the grounding of an electric light wire, it was held that evidence of an electrical mechanical engineer to the effect that there are well-known methods of preventing grounding so that when the grounding is discovered that portion of the system may be disconnected, was not prejudicial to the defendant. Harrison *v.* Kansas City Electric Light Co..... 729

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A witness should not be allowed to testify to the result of an experiment with a piece of insulated wire similar to a feed wire in question, where he is not called as an expert. United Electric L. & P. Co. of Baltimore *v.* State, etc..... 416

Expert testimony is not admissible as to the process of stringing a cable on the arms of poles erected for that purpose. Meehan *v.* Holyoke St. Ry. Co..... 204

Experts should not be permitted to state that locomotor ataxia might result from such a shock as plaintiff claims he received where there was no evidence that he had symptoms of this trouble. Harter *v.* Colfax Elec. L. & P. Co..... 161

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In an action for damages resulting from fire caused by defective wiring, the fact that the fire originated where the wires entered the building was held sufficient to submit the question of the electric light company's negligence to the jury. Romano *v.* Vicksburg Ry. & L. Co..... 62

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A franchise to operate electrical conductors in the streets is property. *In re* Long Acre Electric L. & P. Co..... 10

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Where a telephone company strung its wires over electric light wires, and provided no means of preventing such wires from falling on light wires in case of a break, and deceased came in contact with such broken wire while hitching his horse to a post, it was held a case of *prima facie* negligence. Citizens' Telephone Co. *v.* Thomas 950

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Negligence may be inferred from the omission of a guard between electric light wire and guy wire. Guinn *v.* Delaware & A. Telephone Co. 552

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Where a horse hitched to a post supporting an electric sign was killed by a shock therefrom, it was held that the electric company was not liable where it did not have control over the wires and appliances connected with such sign. Memphis Consol. Gas & Elec. Co. *v.* Skeers 129

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In an action for the death of a horse from shock from electric wire in street caused by small boys, trespassers, pushing a wire along the defendants' wire to a place where the insulation was off, *held*, that defendant was not liable. Luehrmann *v.* Laclede Gaslight Co., *note* 1092

Death of horse attached to fire engine by contact with live wire in street. Eagle Hose Co. *v.* Electric Light Co 1135

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The user of incandescent lights, having no control or authority over any part of the lighting company's plant, wires or other appliances, cannot be charged with liability for their defective condition. Martinek *v.* Swift & Co.....

In an action for death caused by shock from electric light on defendant's premises it was not negligence for defendant to use brass socket, such sockets being in universal use. Martinek *v.* Swift & Co. .....

No recovery can be had against a lighting company for shock from an incandescent light, where the plaintiff's violation of a city ordinance, in failing to notify inspector of wires of changes, contributed to the accident. Brunnelle *v.* Lowell Electric Light Corp. . . . .

Death from shock from incandescent light caused by dangerous proximity of incandescent light wire to arc light wire. Predmore *v.* Consumers' L. & P. Co.....

Death from contact with incandescent light, question whether dangerous current came through light company's wire or through a broken fire alarm wire which had fallen upon high tension wire. Witmer *v.* Buffalo & N. F. E. L. & P. Co.....

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In an action for the death of an employee from contact with an incandescent light wire, it was held that the light company had notice of the dangerous current on the secondary wires or sufficient length of time to have prevented the accident. Goddard *v.* Enzler..... 869

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Where a telephone lineman directed by his foreman to remove an electric light wire received a shock, the foreman having failed to warn him that the electric light company had changed the time for turning on the current, it was held that the foreman was guilty of negligence. East Tennessee Telephone Co. *v.* Carmine 802

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